






*This Book
Does Not
CIRCULATE*



Digitized by the Internet Archive
in 2011 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

CHICAGO BAR
74280
ASSOCIATION

183

A

46373

4 I.A. 2d 81

THADDEUS B. ROWE,)	
Appellant,)	
)	APPEAL FROM SUPERIOR
v.)	
)	COURT, COOK COUNTY.
M. WINSTON MARDIS and)	
MOSES A. MARDIS,)	
Appellees.)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a suit for attorney's fees heard by the court without a jury, judgment was entered against plaintiff, and he appeals.

The complaint charges that plaintiff was retained to represent M. Winston Mardis, defendant in a suit for separate maintenance by his wife, Bobbye Mardis. According to the complaint, Moses A. Mardis, father of M. Winston Mardis, had an interest with his son in real estate described in the complaint for separate maintenance, and since the suit constituted a cloud upon Moses A. Mardis' title, he was interested in that suit and also retained plaintiff to do everything necessary in the premises to obtain a dismissal of the separate maintenance suit. The complaint further charges that plaintiff performed all the services required of him; that defendants refused to pay him; and, therefore, he brings this suit for \$25,000, which he says is the fair, reasonable, usual and customary charges for the services enumerated. He further charges that on May 21, 1947, he fixed a retainer to begin representation of defendants, and that defendants then and there gave him a "rubber check"

RECEIVED

-2-

for \$400 which was not honored by the bank; that following this, he had many conferences, devoted a considerable amount of time to the matter, and finally procured a favorable result. Defendant Moses A. Mardis answered, denying that he consulted with plaintiff and that he requested plaintiff to represent him, or that plaintiff performed any legal services for or on his behalf. Defendant M. Winston Mardis admits the employment of plaintiff as his attorney in the separate maintenance suit, but denies that plaintiff was also retained to represent his father. He avers that he originally retained Joseph E. Clayton, Jr., to represent him in the separate maintenance suit, but that when Clayton became ill and left the city, he was referred to plaintiff and at that time entered into an agreement with plaintiff to pay him \$500 for his services, which he says he has paid in full. He further denies that \$25,000 is a fair fee for the services rendered.

On Friday, November 27, 1953, when this case came up for trial, plaintiff moved for a default against M. Winston Mardis for failure to file an answer. In support of his motion, he showed that Moses A. Mardis was personally served August 24, 1951, and that M. Winston Mardis was served September 5, 1951; that defendant Moses had filed an answer; that Winston's answer was due in October, 1951, but had never been filed. He asked that judgment be entered against defendant M. Winston Mardis for failure to answer. Joseph E. Clayton, Jr., attorney for defendants, stated to

-3-

the court that he believed an answer had been filed on behalf of both defendants and presented what he called a carbon copy of it; that in any event, before any action could be taken on a default, notice had to be served on both parties and that he was ready to file an answer instantly. After some discussion, the court suggested that they proceed upon Mr. Clayton's promise that he would file an answer for Winston the following Monday, November 30, 1953, and that the motion for default would be held in abeyance until that day. An answer was filed as of November 27, 1953. So far as appears from the abstract, no objection was made to the proceeding, and the case then proceeded to trial.

Plaintiff took the witness stand and testified with respect to the issues in the separate maintenance suit and with respect to fees. He testified that Moses and M. Winston Mardis at the first meeting with him said they wanted him to represent both of them and asked what his fee would be; that he told them he would charge according to the fees of the Illinois State Bar Association Schedule. He did not remember how much they gave him on account at that first meeting. He received money later on, but did not remember the exact amount; that it was about \$300. He asked for a \$700 retainer and was given a check for \$400 which was not honored. He further stated that on November 8, 1949, Moses paid him \$200 and that he paid him another \$100 after the filing of this suit. He testified that a reasonable fee

the court of law, I have no doubt but that the
 court will find in favor of the plaintiff, and
 that the defendant will be compelled to pay the
 amount of the debt, and the costs of the
 suit. I am, Sir, very respectfully,
 Your obedient servant,
 J. H. [Name]

It is the duty of every citizen to
 obey the laws of his country, and to
 support the government. It is the duty
 of every citizen to pay his taxes, and
 to serve his country when called upon.
 It is the duty of every citizen to
 respect the rights of others, and to
 live in peace and harmony with his
 fellow-citizens. It is the duty of
 every citizen to be true and honest,
 and to do his duty to the best of
 his ability. It is the duty of every
 citizen to be a good neighbor, and to
 love his country as himself. It is the
 duty of every citizen to be a good
 citizen, and to do his duty to the
 best of his ability.

-4-

was \$5,096. Winston Mardis testified that he alone engaged plaintiff; that his father was not present at the time; that plaintiff told him he would charge a fee of \$500. He testified that he paid plaintiff \$100 in cash; that he told plaintiff he would get the balance within a week or ten days; that the \$400 check was given to the plaintiff with the understanding that it would not be presented for payment, but was in the nature of security; that he gave plaintiff \$50 about May 31, 1947; that during the following summer he gave him \$150, and then again, two additional checks of \$50. Following this, just before the separate maintenance suit was ready to go to trial, plaintiff told him he would not proceed until he received an additional \$300; that Winston said he only owed him \$100, but when plaintiff insisted on \$300, Winston said he would try to get the money; that he did get it from his father and gave it to plaintiff, making a total of \$700 paid to plaintiff. Moses Mardis testified that he was a lawyer, but was not active. He said he did not know there was "any such lawyer as Mr. Rowe in town"; that he did not go to see him on May 21, 1947, or any other time. He denied categorically the transaction with respect to fees which plaintiff testified they had.

The issue presented was clearly one for the trier of fact to decide. In Floyd v. Estate of Smith, 320 Ill. App. 171, the court said, p. 177:

"This case was tried before the court, without a jury, and as a court of review, we will not substitute our findings of fact for the findings of fact of the trial court, unless the judgment is clearly against the manifest weight of the evidence (Chamblin v. New York Life Ins. Co., 292 Ill. App. 532)."

A considerable portion of plaintiff's brief is devoted to the proposition that the court committed error when it denied plaintiff's motion for default for want of answer and gave defendant M. Winston Mardis until the following Monday to file his answer. To this, defendants make two answers: first, that the motion was not properly before the court because no notice had been served, citing Rule 21 of the Superior Court, with supporting cases, (Swiercz v. Nalepka, 259 Ill. App. 262; Risedorf v. Fyfe, 250 Ill. App. 122); and second, that it is within the discretion of the court to allow a default and that defaults are not encouraged. That is true. It is necessary that courts have the power to enter defaults and that they exercise that power with discretion in order to preserve a proper discipline with respect to the court's business and at the same time avoid injustice. Where, as in the instant case, Winston Mardis entered his appearance but failed to file an answer because of an oversight, and the issue was a relatively simple one, the trial court properly allowed the defaulting party to file his answer practically instantaneously and to proceed with the trial of the case.

Judgment affirmed.

Robson and McCormick, JJ., concur.

46381

184
4

I.A.^{2d}

A
81

IN THE MATTER OF THE ESTATE
OF CHARLES ZENISEK, deceased.

ANTOINETTE HAUSER,

Appellee,

v.

BEATRICE KOLAR, Administratrix
of the estate of CHARLES
ZENISEK, deceased,

Appellant.

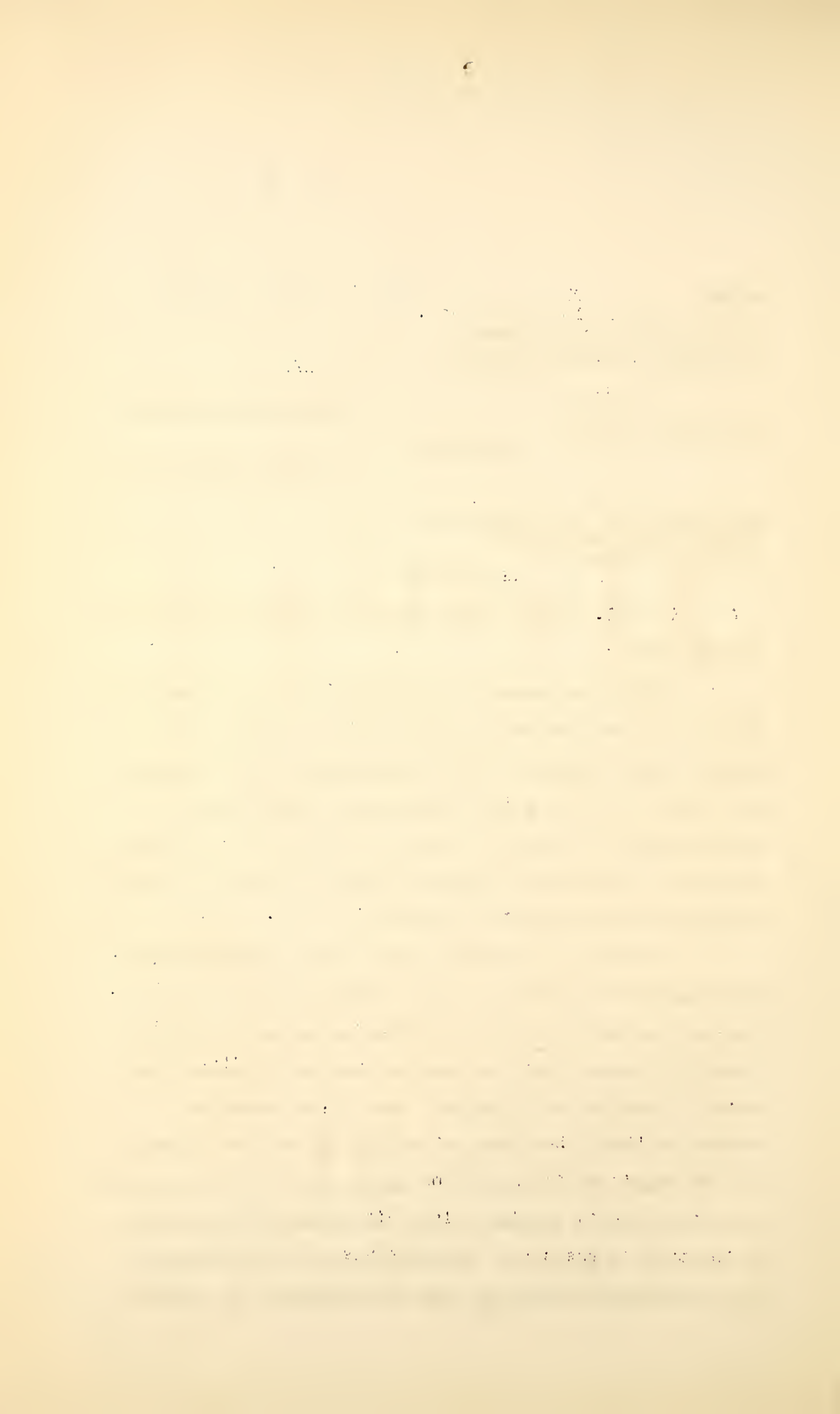
APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION
OF THE COURT.

This is an appeal by defendant from a judgment for \$16,150 entered December 4, 1953, upon a hearing of the cause without a jury. That sum represents the principal and interest due on a note for \$10,000 dated August 10, 1943, alleged by plaintiff Antoinette Hauser to have been delivered to her by the deceased Charles Zenisek in consideration for moneys she had lent him.

For many years prior to his death, Charles Zenisek and Antoinette Hauser were close friends. Two witnesses who were present in plaintiff's home on August 10, 1943, testified that on that day Charles Zenisek delivered the note in question to plaintiff. One of the witnesses testified that at the time he did so, he said to plaintiff that he "knew she would get her money back." The only substantial issue is whether or not the signature of decedent on the note is genuine. In addition to the testimony of the two witnesses that the note was delivered to plaintiff



by the deceased, plaintiff also produced one Joseph Skala, who testified that he was president of the Skala National Bank and president of the Tilsen Safety Deposit Company; that he had handled Zenisek's account; that Zenisek had a safety deposit box at the deposit company and had a signature card on file; that he knew and was familiar with Zenisek's signature; that he considered the signature "alright"; that he "would accept it as Charles Zenisek's signature in a collateral note." Another witness, William Zenisek, a brother of the decedent, testified to a business transaction in which plaintiff appears to have participated. Plaintiff thus established the execution and delivery of the note. Defendant produced an expert witness who compared the signature on the note with the deceased's signature on many cancelled checks introduced for that purpose and who pointed out differences between the signature in question and signatures on the checks. In the case of In re: Will of Barrie, 393 Ill. 111, the court said, p. 123:

"The expression in Fekete v. Fekete, 323. Ill. 468, that opinions as to the genuineness of handwriting are at best weak and unsatisfactory, and that there is much room for error and great temptation to form opinions favorable to the party calling the witness, is clearly demonstrated by the record in this case. The opinion of an expert may be of value only where it calls attention to facts which are capable of verification by the court, and where the opinion is based upon such facts and is in harmony therewith. Lyon v. Oliver, 316 Ill. 292."

We have examined the samples of the genuine signature of Charles Zenisek used by the expert as his standard of comparison, together with a large number of other checks

introduced by the plaintiff containing the decedent's signature. We have compared them with the signature on the note, as did the trial court. It is true that in the signature on the note the letter "k" is off a little and that there are other differences when they are compared with the samples used by the expert as his standards of comparison. However, an examination of signatures on various checks introduced by plaintiff, which were admitted to be genuine, reveal many discernible differences between them. Circumstances under which a signature is affixed, difficulty with a pen or with ink, or slight nervousness can produce such changes. We venture to say that our own signatures on various documents executed from time to time would show differences as numerous and as distinctive as those pointed out by the expert in the instant case.

In Floyd v. Estate of Smith, 320 Ill. App. 171, cited by defendant, the court said, p. 177:

"A fair and candid consideration of all the evidence in this case brings us to the inescapable conclusion that the judgment in this case is just and proper and has abundant support in the evidence. This case was tried before the court, without a jury, and as a court of review, we will not substitute our findings of fact for the findings of fact of the trial court, unless the judgment is clearly against the manifest weight of the evidence (Chamblin v. New York Life Ins. Co., 292 Ill. App. 532); and as a reviewing court, we will accept the findings of the trial judge upon questions of fact, based upon the statements of witnesses whom he saw and heard testify, unless such findings are clearly and palpably erroneous (Kinnah v. Kinnah, 184 Ill. 284)."

In our opinion, the judgment of the trial court is sustained by the manifest weight of the evidence.

Judgment affirmed.

Robson and McCormick, JJ., concur.

46329

ROBERT HOLZMANN,

Appellee,

v.

WILLIAM HOLZMANN and

AUGUSTE HOLZMANN,

Appellants.

4

I.A.^{2d} 82

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal by William Holzmann and Auguste Holzmann, defendants, from a decree of foreclosure entered by the trial court in favor of Robert Holzmann, the plaintiff. Defendants cite twenty-two errors alleged to have been committed by the trial court. It is apparent in reading the briefs and record that they have done so with the hope that some one point might be taken by this court as possessing merit.

The record reveals that the plaintiff is a brother of the defendant William Holzmann. On August 8, 1930, defendants executed a note in the sum of \$5,000, with interest payable at six per cent per annum, secured by a trust deed, on the premises commonly known as 1643 Fletcher street, Chicago, Illinois. On December 10, 1942, the principal sum of \$4,750 of the indebtedness evidenced by the principal note was extended to December 8, 1952. The extension agreement provided for monthly payments with interest at five per cent per annum. On June 1, 1949, defendants defaulted in the monthly payments. Because of this default plaintiff filed his complaint for foreclosure. To the

34

10

1. The first group of people who are not in the labor force are those who are not in the labor force for any reason. This group includes people who are not in the labor force because they are not in the labor force for any reason. This group includes people who are not in the labor force because they are not in the labor force for any reason.

[illegible][illegible][illegible]

1. 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319

[illegible]

Dr. J. S. H. ...

and (b) the fact that the H^+ concentration in the solution is not known.

[illegible][illegible]

Abstract: The purpose of this study was to determine the effect of a 12-week training program on the physical fitness of 10-year-old children. The study was conducted in a primary school in the city of Ankara, Turkey. The children were divided into two groups: a control group and an experimental group. The experimental group participated in a 12-week training program that included aerobic, strength, and flexibility exercises. The physical fitness of the children was measured at the beginning and end of the training program using a series of tests. The results of the study showed that the experimental group had significantly higher levels of physical fitness than the control group at the end of the training program. The findings of this study suggest that a 12-week training program can improve the physical fitness of 10-year-old children.

-2-

complaint defendants filed a sworn answer alleging among other things as a defense that plaintiff had been overpaid on the note and that plaintiff was indebted to them in the sum of \$507; that plaintiff had surrendered the note and trust deed to them because of the overpayment but subsequently by false representation to Auguste Holzmann secured their return.

Defendants also filed a counterclaim to which plaintiff filed a motion to strike. The trial court allowed the motion. Defendants filed an amended counterclaim to which plaintiff filed a motion to strike and the trial court allowed it.

Defendants contend that it was error for the trial court to dismiss the amended counterclaim. We have examined the counterclaim. The facts are disconnected. It is contradictory, confusing and inconsistent with the sworn answer which defendants had filed to the complaint. It charges fraud on behalf of the plaintiff but the fraudulent acts are stated only in general terms. See Anderson v. Elliott, 1 Ill. App. 2d 448, 455. A counterclaim is affirmative in character and must contain all the elements of an original suit. Wilson v. Tromly, 404 Ill. 307, 313. A counterclaim must not be inconsistent with allegations alleged in the answer. We conclude that the trial court did not err in striking the amended counterclaim.

The next point that we will consider is defendants'

-3-

contention that the evidence reveals that the note was paid and that plaintiff delivered the note and mortgage to the defendants. Defendant William Holzmann testified that on or about August 22, 1949, he and plaintiff had a discussion pertaining to the balance due on the principal note. Plaintiff is supposed to have agreed that he owed defendants \$507 and as a result delivered to William Holzmann the note, trust deed and various other papers. Defendant Auguste Holzmann testified that plaintiff on the excuse of wanting a paper for the meeting with William Immel took the note, trust deed and other mortgage papers back. She did not receive a receipt. On cross-examination William Holzmann admitted that he and plaintiff in October and November of 1949 held conferences with a mutual friend, William Immel, for the purpose of settling their differences and reaching an accounting. He also admitted that in June of 1949 he owed a balance on the principal note of \$2,440. Defendants' son and two friends of the family testified they had seen the mortgage papers at defendants' home and in their possession. Defendants in their answers to the questions put by plaintiff's counsel and the master were evasive and contradictory. The testimony of the witnesses who were alleged to have seen the note, trust deed and other papers in defendants' possession was vague and indefinite.

Plaintiff denied ever having delivered the documents in question to the defendants or agreeing that he owed defendants \$507. He denied taking the papers back. He

The first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the
the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the
the twenty-first is the fact that the
the twenty-second is the fact that the
the twenty-third is the fact that the
the twenty-fourth is the fact that the
the twenty-fifth is the fact that the
the twenty-sixth is the fact that the
the twenty-seventh is the fact that the
the twenty-eighth is the fact that the
the twenty-ninth is the fact that the
the thirtieth is the fact that the
the thirty-first is the fact that the
the thirty-second is the fact that the
the thirty-third is the fact that the
the thirty-fourth is the fact that the
the thirty-fifth is the fact that the
the thirty-sixth is the fact that the
the thirty-seventh is the fact that the
the thirty-eighth is the fact that the
the thirty-ninth is the fact that the
the fortieth is the fact that the
the forty-first is the fact that the
the forty-second is the fact that the
the forty-third is the fact that the
the forty-fourth is the fact that the
the forty-fifth is the fact that the
the forty-sixth is the fact that the
the forty-seventh is the fact that the
the forty-eighth is the fact that the
the forty-ninth is the fact that the
the fiftieth is the fact that the
the fifty-first is the fact that the
the fifty-second is the fact that the
the fifty-third is the fact that the
the fifty-fourth is the fact that the
the fifty-fifth is the fact that the
the fifty-sixth is the fact that the
the fifty-seventh is the fact that the
the fifty-eighth is the fact that the
the fifty-ninth is the fact that the
the sixtieth is the fact that the
the sixty-first is the fact that the
the sixty-second is the fact that the
the sixty-third is the fact that the
the sixty-fourth is the fact that the
the sixty-fifth is the fact that the
the sixty-sixth is the fact that the
the sixty-seventh is the fact that the
the sixty-eighth is the fact that the
the sixty-ninth is the fact that the
the seventieth is the fact that the
the seventy-first is the fact that the
the seventy-second is the fact that the
the seventy-third is the fact that the
the seventy-fourth is the fact that the
the seventy-fifth is the fact that the
the seventy-sixth is the fact that the
the seventy-seventh is the fact that the
the seventy-eighth is the fact that the
the seventy-ninth is the fact that the
the eightieth is the fact that the
the eighty-first is the fact that the
the eighty-second is the fact that the
the eighty-third is the fact that the
the eighty-fourth is the fact that the
the eighty-fifth is the fact that the
the eighty-sixth is the fact that the
the eighty-seventh is the fact that the
the eighty-eighth is the fact that the
the eighty-ninth is the fact that the
the ninetieth is the fact that the
the ninety-first is the fact that the
the ninety-second is the fact that the
the ninety-third is the fact that the
the ninety-fourth is the fact that the
the ninety-fifth is the fact that the
the ninety-sixth is the fact that the
the ninety-seventh is the fact that the
the ninety-eighth is the fact that the
the ninety-ninth is the fact that the
the hundredth is the fact that the

admitted that there was a controversy as to the balance due on the principal note. He stated that he and defendant William Holzmann agreed to have William Immel try to work out an accounting. He stated that they reached an accounting through the efforts of William Immel in November of 1949 and that it was agreed that defendant William Holzmann owed as of June, 1949, the sum of \$2,440 less a credit of \$59.72. William Immel, the mutual friend of plaintiff and defendants who was in the real estate business, testified he held several meetings with the plaintiff and defendant William Holzmann the latter part of October and the first of November of 1949 to try to reach an adjustment of their differences as to the balance due on the principal note. In November they reached an agreement and the accounting showed that there was a balance of \$2,440, less a credit of \$59.72, due and owing from the defendants to plaintiff. Immel stated that at no time did defendant William Holzmann at the various meetings claim that the note had been overpaid by \$507 or any sum. He at no time claimed that plaintiff had delivered to him the note, trust deed and other mortgage papers. He at no time claimed that by false representation plaintiff had surreptitiously secured the note, trust deed and other mortgage papers. The testimony of plaintiff and his witnesses was direct, not evasive and not contradictory.

The master who heard and saw the witnesses found that there had been no delivery of the notes to the defendants; that an accounting had been stated between

-5-

the parties as a result of the conferences with William J. Immel and that defendants owed plaintiff the sum of \$2,440 less a credit of \$59.70 on the principal note, or a total of \$2,380.30. Where much of the evidence is conflicting and the credibility of the witnesses of the utmost importance, we would not be justified in reversing the master who heard and saw the witnesses and the court that adopted the findings after a full hearing. Zeta Bldg. Corp. v. Garst, 408 Ill. 519. Church of God, Decatur. Ill. v. Finney, 344 Ill. App. 598.

If we were to consider the numerous other contentions raised by defendants the length of this opinion would be beyond all bounds of reasonableness. It is sufficient to say that we have examined them and find they are without merit.

The decree of the trial court is affirmed.

Decree affirmed.

Schwartz, P. J., concurs.

McCormick, J., took no part.

MS.
12.

A

Case 431g

Abstract

4 I.A.^{2d} 83

Gen. No. 10780

Agenda No. 16.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
OCTOBER TERM, A. D. 1954.

P. W. GUSTAFSON, etc., Appellees.)	
vs.)	
LIBERTYVILLE MOTORS, INC., etc. et al.)	
Appellant,)	
		Appeal from the
		Circuit Court of
		Lake County.
Appeal of)	
LIBERTYVILLE MOTORS, INC., etc.,)	
Counter-Claimant--Appellant,)	
vs.)	
P. W. GUSTAFSON, et al.,)	
Counter-Defendants--Appellees))	

WOLFE,--P.J.

This is an appeal by Libertyville Motors, Inc., from the order of the Circuit Court of Lake County, Illinois, dismissing its amended and supplemental counterclaim, on motion of the counter defendants, Gustafson, Gratz & Gratz. The case arises solely on the pleadings. The counterclaim had for its purpose the reimbursement of Libertyville Motors for various improvements placed on certain real estate, title to which was held in a land trust by the First National Bank of Lake

A

12/1/19

88 A.I. 4

1919

LIBRARY OF THE
UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

LIBRARY OF THE
UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

LIBRARY OF THE
UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

1919

This is an account of the work of the
Library of the United States Department of Agriculture
during the year 1919. The work of the library
is to collect, preserve, and make available to the
public the books, pamphlets, and other printed
materials which are of interest to the
Department of Agriculture. The work of the
library is to collect, preserve, and make available
to the public the books, pamphlets, and other
printed materials which are of interest to the
Department of Agriculture.

Forest, Illinois. The order appealed from is as follows:

"This cause coming on to be heard upon the motion of the counter-defendant P. W. Gustafson, all parties being present in open court by their respective counsel, and the court having heard the arguments of counsel and being fully advised in the premises, finds that said motion should be granted;

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of said counter-defendant filed on March 2, 1954 to dismiss the amended and supplemental counter-claim of Libertyville Motors, Inc., an Illinois corporation, the counter-claimant in the above entitled cause, stand as the motion of said counter-defendant to dismiss the Amended and Supplemental Counter-claim of said Libertyville Motors, Inc., an Illinois corporation, as amended by order of court entered this day.

"And this cause coming on to be heard upon the motion of said counter-defendant, P. W. Gustafson, to dismiss the amended and supplemental counter-claim as amended of Libertyville Motors, Inc., an Illinois corporation, the counter-claimant herein, and the court having heard the arguments of counsel and being fully advised in the premises finds that the aforesaid motion to dismiss should be granted.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the said motion of said counter-defendant, P. W. Gustafson, to dismiss said Amended and Supplemental counter-claim as amended, be and the same is hereby allowed

3.

and that said amended and supplemental counter-claim as amended be and the same is hereby dismissed as to said counter-defendant, P. W. Gustafson."

To give this Court jurisdiction of an appeal it is necessary that there should be an entry of record containing the essential elements of a judgment. While there is no motion to dismiss this appeal, it is incumbent on this Court to meet and decide the question. *Norris Grain Co., vs. Brown*, 318 Ill. App. 646; *The People vs. C. P. & Q. R. Co.*, 306 Ill. 166; *Klemtner vs. City of Chicago*, 356 Ill. 185; *Gillette vs. The City of Chicago*, 396 Ill. 619.

The order appealed from is not a final order or judgment, and the appeal therefore must be dismissed.

Appeal dismissed.

Dove J., concurs.

Anderson, J. took no part.

... ..

major on all tracks except chemistry. It is necessary to determine what

THE ABOVE SPECIFIED TERM IS NOT A FINAL ORDER OR JUDGMENT.

*These two DPs will have a different number of groups and will have a different

Dove J. counts.

Anderson, J. took no part.

220

A

46389

4

I.A.^{2d}

83

VICTORIA PUSKORIS,

Appellee,

v.

JOSEPH and ANN GULIK,

Appellants.

)
)
)
)
)
)
)

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION
OF THE COURT.

In a trial by the court without a jury of an action
in forcible entry and detainer the court found for plain-
tiff, and defendants have appealed. No brief has been
filed on behalf of plaintiff. The basis of the action is
a clause in the lease reading as follows:

"Tenth: In case said premises shall be rendered
untenantable by fire, explosion or other casualty
lessor may, at his option, terminate this lease or
repair said premises within sixty (60) days. If
lessor does not repair said premises within said time,
or the building containing said premises shall have
been wholly destroyed, the term hereby created shall
cease and determine."

The sole issue is whether the premises as a matter of fact
had become untenable. The evidence presented on behalf
of plaintiff shows that a boiler in the basement connected
with the heating apparatus cracked and water ran from the
boiler into the sewer. Thereupon, the landlord told the
tenants she would not restore the boiler unless the tenants
signed a new agreement, the character of which does not
appear. The tenants continued to occupy the premises
leased, which included a tavern on the first floor of the
building, with living quarters in the rear. They provided
heating for themselves by means of stoves and an electric

-2-

burner. So far as appears, they were not disturbed in their occupancy of the premises. The burden was on plaintiff to show that the premises had become untenable. A breakdown in the heating apparatus which could have been remedied without great difficulty is not within the meaning of untenableness, as used in the lease in question. Basketeria Stores, Inc. v. Shelton, 199 N.C. 746, 155 S.E. 863; D. A. Schulte, Inc. v. American Realty Corp., 256 Mass. 258, 152 N.E. 233; Millen Hotel Co. v. Gray, 67 Ga. App. 38, 19 S.E. 2d 428; Amzi Realty & Building Co. v. Kelly, 49 S.W. 2d 214 (Mo. Ct. of Appeals).

Judgment reversed.

Robson and McCormick, JJ., concur.

43

Journal of Management Studies, 19(1), 67-80.

1. 1. 1. 1. 1. 1.

2. 2. 2. 2. 2. 2.

3. 3. 3. 3. 3. 3.

4. 4. 4. 4. 4. 4.

5. 5. 5. 5. 5. 5.

6. 6. 6. 6. 6. 6.

7. 7. 7. 7. 7. 7.

8. 8. 8. 8. 8. 8.

9. 9. 9. 9. 9. 9.

10. 10. 10. 10. 10. 10.

11. 11. 11. 11. 11. 11.

221

A

46294

4

I.A. 2d 84

EDNA BRACKENSICK,

Appellant,

v.

CHICAGO MOTOR COACH COMPANY,
a corporation,

Appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is an action by plaintiff against defendant, a common carrier, to recover damages for personal injuries sustained while a passenger in defendant's bus. Trial was before a jury and a special finding and general verdict were rendered for defendant and judgment entered thereon. Plaintiff made the usual post-trial motions. These were denied and plaintiff appeals.

The sole errors urged by plaintiff on this appeal deal with defendant's given instructions.

The report of proceedings certified on appeal contains the general statement that the parties, to maintain the issues, introduced evidence tending to prove the allegations of their pleadings. The only actual testimony incorporated in the report of proceedings is that dealing with the cross-examination of Mitchell Chess, defendant's witness and driver of its bus. Written motions for directed verdicts by both parties were denied. It has been decided that where the sole question for review relates to the instructions and is one of law, it is only necessary in the report of proceedings certified on appeal to recite that

the evidence tended to prove the issues and was conflicting. (See, e.g., Daubach v. Drake Hotel Co., 243 Ill. App. 298, 300.) We will limit our review to only those issues that can be decided as a matter of law without any reference to disputed facts.

The declaration in substance alleges that defendant was a common carrier of passengers for hire; that plaintiff boarded one of its busses on Jackson boulevard in the City of Chicago, paid her fare, and was transported westerly along Jackson boulevard; that she was at all times in the exercise of due care for her own safety; that it was the duty of defendant to use the highest degree of care in operating said bus, which was then and there owned, operated and controlled by defendant for the safety of its passengers; that notwithstanding said duty, defendant was guilty of one or more of the following acts of negligence:

"A. Operating its said bus in a careless and negligent manner.

"B. Operating said bus at an excessive rate of speed.

"C. Bringing said bus to a sudden and abrupt stop without warning to the passengers therein.

"D. Failing to maintain the said bus in a good mechanical operating condition. [This subparagraph was withdrawn by leave of court during trial.]

"E. Failing to exercise the highest degree of care and caution for the safety of the passengers of the said bus."

It then alleges that as a result of defendant's breach of duty and one or more of the specified acts of negligence the bus

was brought to a sudden and abrupt stop at or near the intersection of Jackson boulevard and Lotus street in the City of Chicago and plaintiff was thrown to its floor and severely injured.

Defendant's bus driver, Chess, testified on cross-examination that shortly before the occurrence in question and sometime after the evening rush hour, he was proceeding westerly along Jackson boulevard in the lane nearest the curb. The westbound two-lane half of the boulevard accommodates two cars. It was not crowded. The westbound half of the street ahead of him was clear for at least a block. Not many people were in the bus. In his mirror, he saw Miss Brackensick get up from her seat. He didn't remember if she rang a buzzer for him to stop at Lockwood. He then noticed a Ford car approaching from the rear along the left side and toward the back of the bus. At this point the bus had passed Laramie and was about a hundred feet east of Lockwood avenue. He was going about twenty, perhaps twenty-five miles per hour, slowed down, and as he slowed down to fifteen or ten miles per hour the Ford car traveling in its own lane and about two or three feet south of the left side of the bus, pulled up alongside and passed him. The bus at this point was about twenty or twenty-five feet east of Lockwood avenue. Then, without the bus driver noticing that the Ford car was turning, the driver of the Ford turned diagonally or obliquely to his right and across

the front of the bus, cutting it off, apparently intending to travel north along Lockwood avenue. Perhaps half to three-fourths of the car was in the bus' lane with its left rear outside and still in the south lane. The driver of the bus applied his brakes and came to a stop about a foot before the right rear fender of the Ford.

The trial court gave twenty-six instructions, sixteen at the request of defendant.

Plaintiff complains of defendant's given Instructions Nos. 1, 2, 3 and 11 on numerous grounds but, principally, on the ground that they require a common carrier to exercise only ordinary care for the safety of its passengers.

Instruction No. 1 reads,

"The court instructs the jury that the relation of passenger and carrier does not make the carrier an insurer of the absolute safety of the passenger. The carrier does not guarantee that it will protect passengers against remote unusual and extraordinary perils not to be foreseen by the exercise of the highest degree of care reasonably consistent with the practical operation of the carrier's business. The carrier is not required to exercise a degree of care which is not practicable in the operation of its business and if the jury believes from the evidence that the injuries, if any, to the plaintiff could only have been prevented by a degree of care and caution on the part of the defendant, or its driver, not reasonably practical or to be anticipated in the operation of said defendant's business, then the plaintiff cannot recover against the defendant."

Instruction No. 2 reads,

"The court instructs the jury that negligence is the omission to do something which a reasonable person, **guided** by those ordinary considerations which ordinarily regulate human affairs would do, or the doing of something which a prudent and reasonable person would not do."

Instruction No. 3 reads,

"You are instructed that the law did not require the chauffeur in charge of the defendant's coach in question that he should be at all times upon guard against dangers not reasonably to be expected, nor did it require him to conduct his coach with a degree of caution that would prevent a practical operation thereof."

Instruction No. 11 reads,

"The court instructs the jury that if you believe and find from the evidence under the instructions of the court, that the driver of defendant's motor coach, immediately prior to the occurrence in question, was placed in a sudden emergency, with peril imminent, without any carelessness or negligence on his part, as the result of an automobile making a sudden right hand turn from the left side of defendant's motor coach without any signal or warning, requiring the driver of defendant's coach to bring the said coach to a sudden stop to avoid the occurrence, then you are instructed that under such state of proof the driver of defendant's motor coach would not be required to use the same degree of self-possession, coolness and judgment as when there is no imminent peril, but if the driver acted as an ordinary prudent person would have acted under like or similar circumstances, then the plaintiff cannot recover from the defendant."

Specifically, plaintiff complains that Instruction No. 2, when considered together with No. 11, led or could have led the jury to believe that defendant was to be held only to an ordinary standard of care.

Plaintiff by this objection would apparently have this court isolate certain instructions from the balance for the purpose of passing on her contention. This we cannot do. Instructions must be considered as a series when passing on an objection such as is raised here. Bobalek v. Atlass, 315 Ill. App. 514, 525, and numerous cases there reviewed. Plaintiff's given Instruction No. 21 informed the jury that a common carrier was under the duty to do all that human care,

STC 3000 announced that they had just received
the first order for the STC 3000 and that the

THE UNIVERSITY OF CHICAGO LIBRARY

Figure 10. Graph of $\log_{10} \text{var}(\hat{\theta})$ vs. $\log_{10} n$ for $\theta = 0.5$.

diligence and foresight could reasonably do consistent with the practical operation of its bus line for the safety of its passengers. Its given mandatory Instruction No. 22 contained the same statement. These instructions clearly informed the jury of the high degree of care which defendant was required to exercise toward the plaintiff as a passenger under normal circumstances. From the record before this court, it is apparent that Chess, defendant's bus driver, was confronted with a sudden emergency. This fact must therefore be taken into consideration. It is in the nature of things that under such circumstances men cannot be expected to act with the same care, caution and judgment as they would normally. The law recognizes this and the defendant had a right to have the jury instructed on this point. Nor is defendant required to guard against unusual or extraordinary perils, which would cripple the practical operation of its bus. (Barnes v. Danville Street Ry. Co., 235 Ill. 566, 570-1; see also North Chicago St. R.R. Co. v. O'Donnell, 115 Ill. App. 110; Coffey v. Sampsell, 174 Ill. App. 576.) Considering all the instructions on care given on behalf of both defendant and plaintiff, we are of the opinion that the law was conveyed to the jury with substantial accuracy.

Plaintiff next complains that defendant's mandatory Instruction No. 1 obscures the issues by its statement that the carrier is not an insurer of the safety of its passengers. Plaintiff cites Crisler v. Chicago City Ry. Co., 204 Ill. App. 491, 492, as so holding. It holds only that such an instruction

is erroneous where inapplicable to the evidence. Moreover, it does not appear from the abstract of opinion in the reports whether the instruction was qualified or not by other language setting forth the high standard of care imposed upon carriers under the law. Such an instruction was approved in Carevic v. Richardson, 280 Ill. App. 619. We have before us an incomplete transcript of the evidence, and whether such an instruction was inapplicable to the evidence goes beyond the scope of this court's review of the record for errors of law. (Cf. Daubach v. Drake Hotel Co., supra.) On appeal the presumption is that the judgment entered by the trial court was correct and the burden of proving error is upon the party appealing therefrom. (222 East Chestnut Street Corp. v. Murphy, 325 Ill. App. 392, 399; and see, generally, 5 C.J.S. Appeal and Error, sec. 1560, p. 362, n. 23 and cases there cited.) Plaintiff has not sustained that burden with respect to the instant instruction.

Plaintiff next complains of defendant's mandatory Instruction No. 4, which begins "If you believe, etc.," on the ground that it did not restrict the jurors' belief to the evidence. She cites numerous cases in support of her contention, among them People v. Bradley, 324 Ill. 294, 309, and Smith v. Bellrose, 200 Ill. App. 368. In these cases all the evidence was before the court and its weight in each given determinative consideration in passing upon the questions of error in the instruction. In none of the cases was such objection to the instruction as plaintiff urges held to

be the sole ground for reversal. In the absence of all the actual evidence before us, although not approving of the instruction, we cannot hold that the giving of it was reversible error.

Finally, plaintiff complains of defendant's Instructions Nos. 6 and 15. Instruction No. 6 reads,

"The burden of proof is not upon the defendant to show that it is not guilty of the charges made by the plaintiff in the complaint, but the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant is guilty."

Instruction No. 15, which is mandatory, reads,

"You are instructed that the plaintiff is required by law to prove her case by a preponderance of the evidence against the defendant before she can recover against the defendant. If the plaintiff in this suit has not so proved her case, or if the evidence is evenly balanced so that you are unable to say on which side is the preponderance, in either of these cases you would not be justified in returning a verdict for the plaintiff and your verdict should be for the defendant."

She contends, first, that the burden was upon defendant to show that it exercised the highest degree of care after plaintiff made out a prima facie case and that, therefore, Instruction No. 6, when considered together with No. 15, was erroneously given. She cites certain cases which she contends hold that facts shown may raise a presumption of negligence against a common carrier which would then require the carrier to show by competent evidence that it had exercised extraordinary care and diligence. The law on this point is clearly stated in Ferrier v. Chicago Railways Co., 185 Ill. App. 326, 329:

[The page contains extremely faint, illegible text, likely bleed-through from the reverse side.]

"* * * it is said that it was prejudicial error to instruct the jury 'that the burden of proof * * * is on the plaintiff to prove by a preponderance or greater weight of the evidence that the accident happened in the way she contends and not as the defendant contends.' This is only part of the instruction, but in general it instructs the jury that the burden of proof is upon the plaintiff, and it is said that this is erroneous in the case of a passenger and carrier, for the reason that, having established her prima facie case, the burden shifts onto the defendant to make out its defense. This is not the law even in a res ipsa loquitur case. While it may be true that at times the defendant is under the necessity of producing evidence to rebut the presumption of negligence, still the general rule as to the burden of proof is not changed. The burden of establishing a case by a preponderance of the evidence rests upon the party asserting the affirmative of the issue, and this never shifts during the course of the trial but remains with him to the end. Here the burden of proof to establish her claim by a preponderance of the evidence was upon the plaintiff, and the instruction in this regard was not erroneous. Chicago Union Traction Co. v. Mee, 218 Ill. 9; Elgin, A. & S. Traction Co. v. Hench, 132 Ill. App. 535."

Instruction No. 6 has also been approved in Chicago Union Trac. Co. v. Mee, 218 Ill. 9, 13-16; Stollery v. Sprague, 301 Ill. App. 209, 215; and cf. Garlinski v. Chicago City Ry. Co., 257 Ill. App. 414, 423-4.

Plaintiff next contends that Instructions Nos. 6 and 15 refer the jury to the complaint. This point might possess merit (see, e.g., Magill v. George, 1 Ill. App. 2d 222, 117 N.E. 2d 567, abstract opinion, supplemental opinion upon rehearing filed February 18, 1954), but because her own Instruction No. 22 is subject to the same criticism, she cannot be heard to complain. (See Krohn v. O'Bara, 351 Ill. App. 476, 483.)

Plaintiff finally contends that Instruction No. 6 led the jury to believe that plaintiff had to prove all

specified acts of negligence before she could recover. She cites in support of her contention Dowd v. Chicago City Ry. Co., 153 Ill. App. 85, and Rogers v. Mason, 345 Ill. App. 560. In both cases cited by plaintiff the instructions were peremptory and directed a verdict for the defendant. The objection in the instant case received no consideration from the court in the Dowd case supra, and giving the instruction was held reversible error upon a point not relevant or material here. In the Rogers case supra the language of the instruction was prolix and differed materially in many respects. We do not find in the instant case the objectionable language of that instruction. This instruction is nonperemptory and is without palpable error. To hold otherwise would require us to distort its natural meaning and purport. We do not believe that the jury was or could have been misled.

Plaintiff in her brief makes numerous additional objections to the instructions, for example, that many of them assume facts in controversy, that certain of said facts are not credible, that the instructions preclude or ignore other grounds of recovery, and so on. Most of these are directed at questions the answers to which if given by this court would involve assumptions about the state of the evidence in that part of the record not before us. We stated at the beginning of this opinion that we would review only those issues that could be decided as a matter of law without reference to disputed facts. There are other objections which are technical and without

-11-

merit.

We conclude that the giving of defendant's instructions complained of was not reversible error.

The judgment of the trial court is affirmed.

Judgment affirmed.

Schwartz, P. J., and McCormick, J., concur.

We do not think that the...

...the people of the world...

The first...

...

...

46003

MICHAEL J. ROGERS,

Appellee,

v.

ELGIN, JOLIET AND EASTERN
RAILWAY COMPANY, a
corporation,

Appellant.

4

I.A.^{2d} 111

APPEAL FROM COUNTY COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION
OF THE COURT.

This is an appeal from a judgment on verdict for \$1,500 in a suit under the Federal Employers' Liability Act. Plaintiff, a switchman employed by defendant, was injured on the night of June 22, 1951. He was working on the 3 to 11 P.M. shift, and at 10:40 P.M., was moving his train over a track in the South Chicago yard located in a steel company plant. Halfway inside the yard plaintiff and the conductor jumped off the moving caboose and headed for a shanty to wash up before going home. This was near a point where a narrow gauge railroad operated by the steel company intersected defendant's tracks. As plaintiff jumped off the car, he slipped on some grease which had been dropped from the narrow gauge railroad cars. Plaintiff testified that he was familiar with the premises and that he had "noticed a grease spot in that area before." The conductor testified that after the accident, "I didn't go back to see if there was grease there, but I know that sometimes there is."

When we took this case on briefs and oral argument,

ROYAL ANTHROPOLOGICAL INSTITUTE

OF GREAT BRITAIN AND IRELAND

Volume 34

Part 1. 1904

London: Published by the Royal Society

1904

Printed by the Royal Society

1904

1904

1904

1904

1904

1904

1904

1904

1904

1904

1904

1904

1904

1904

1904

1904

1904

1904

-2-

certain questions appeared to us to be doubtful. We have held the case pending the decisions by the Supreme court of Illinois in cases there pending which we thought relevant to the issues in the instant case. Since that time, opinions in Bonnier v. Chicago, Burlington & Quincy R.R., 2 Ill. 2d 606, and Pitrowski v. N. Y. Chicago & St. Louis R. R. Co., No. 33177, filed September 23, 1954, have come down and have settled any doubts we may have had. While the proof of notice to defendant of the dangerous condition is slight, and while plaintiff's conduct had elements of negligence contributing to the injury, these questions, under the decisions cited, were for the jury and its verdict is conclusive.

It is urged upon us that the verdict of \$1,500 was excessive. Considering all the testimony, including plaintiff's statement that he has difficulty with his knee in damp weather, we cannot say that the verdict was excessive.

Judgment affirmed.

Robson, J., concurs.

Tuohy, J., took no part.

232

K

46405

4 I.A.^{2A} 112

ADRIENNE FALCON and JOSEPH FALCON,)	APPEAL FROM
Appellants,)	
v.)	SUPERIOR COURT
ALBERT La ROCHE,)	
Appellee.)	COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with a counterclaim for property damages. Verdicts were for the defendant on the plaintiffs' claims and for him and against Adrienne Falcon on his counterclaim. Plaintiffs have appealed. We shall refer to Adrienne Falcon as plaintiff.

On May 19, 1951 the automobiles which plaintiff and defendant were driving collided at Neenah and Foster Avenues in Chicago. Both autos were being driven west and the collision occurred when plaintiff was making a left turn off Foster into Neenah.

Plaintiff contends that the trial court erred in denying her a new trial because of prejudicial conduct on the part of defendant's attorney and that the court erred in ruling on admissibility of evidence and in instructing the jury.

During the redirect examination of defendant's witness Pratl the following took place:

" . . . Q. Are you married? A. Yes, sir.

That is objected to. What do we care?

Sustained.

1. The first part of the report is devoted to a description of the general situation in the country. It is a very interesting and detailed account of the political and social conditions. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country.

2. The second part of the report is devoted to a description of the economic situation. It is a very interesting and detailed account of the economic conditions. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country.

3. The third part of the report is devoted to a description of the cultural situation. It is a very interesting and detailed account of the cultural conditions. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country.

4. The fourth part of the report is devoted to a description of the military situation. It is a very interesting and detailed account of the military conditions. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country.

Q. Do you have any children?

That is objected to."

Soon thereafter defendant La Roche testified and the following took place:

" . . . Q. Do you have any children?

That is objected to.

A. Three.

That is objected to. Just a minute.

Sustained."

In McCarthy v. The Spring Valley Coal Co., 232 Ill. 473, the court held that it was error to admit the irrelevant evidence of appellee's wife and five children and that once lodged in the minds of the jury the facts could not be erased by an instruction. It was pointed out that a remittitur did not cure the error and that it was impossible to judge the effects of the "impressions wrongfully conveyed." Though, the reference there was to ~~defendant as a witness~~ that fact does not distinguish it from the instant case. It is true that the jury was told by defendant's attorney without objection in the opening argument that La Roche was "married and living with his family." We think this does not cure the error. The questions were first put to Pratl and objections were sustained. Soon thereafter the very same questions were repeated to La Roche and though objection was pending the witness answered. We think these questions were particularly prejudicial because their effect could be an unfair imputation to plaintiff arising from contrasting her

status as a "model" and her activities as a beauty contestant with defendant's status as a family man.

It is true that no motion was made to instruct the jury to disregard or to declare a mistrial when the errors occurred but neither motion was made in McCarthy v. The Spring Valley Coal Co., 232 Ill. 473. The omission was not fatal. The question is whether the conduct was of such a character that it was likely to prejudice plaintiff and if so was the verdict so clearly proper that notwithstanding the conduct a new trial ought not be granted. Crutchfield v. Meyer, 414 Ill. 210, 214. We are not impressed with the argument of defendant that the testimony was justified to show that defendant was a responsible family man thus offsetting any implication of his intoxication.

In the direct examination of defendant's medical witnesses, defendant's attorney used a hospital report as a means of impeaching plaintiff's medical witness. Defendant's witnesses were asked to examine the report and tell whether in the report there was any reference to removal of a cyst or to the sending of part of a cyst to a laboratory. The questions to the witnesses were repeated after objections had been sustained.

This was improper impeachment. Defendant's attorney had used the report in attempting to impeach plaintiff's medical witness on cross-examination. The report had been written by that witness and we think that its use in examining him was proper. Flynn v. Troesch, 373 Ill. 275.

[illegible]

Its use was not proper in direct examination of defendant's medical witnesses. In the first place the defense testimony of the report was not impeaching but on the contrary merely repeated what plaintiff's medical witness said about it. This repetition and emphasis was likely to confuse the jury. In the second place one of the doctors was asked what the hospital report indicated to him. The witness answered "close examination describes an appendix" and that there was no indication of an ovarian cyst. The report was not in evidence and though we need not decide whether it was admissible there was no justification for the doctor telling the jury what his examination of the report disclosed.

Defendant's instruction No. 1, told the jury that if plaintiff's failure to use ordinary care contributed "in any degree" to her injuries there was contributory negligence. Plaintiff claims this was an erroneous statement of law while defendant urges the instruction is proper. Both rely on Crawford v. Cahalan, 259 Ill. App. 14, where it was said that plaintiff could not recover if "he was guilty of any negligence which contributed. . . ." Does "any" mean "in any degree"? Until a better day trial attorneys will seek advantage of fine distinctions made in their favor. Plaintiff has not cited a case to us criticizing the term used by defendant.

We think defendant's instruction No. 2 should not have been given. There was no issue as to whether defendant owed plaintiff the "highest degree" of care and consequently saying that defendant had not that obligation was unnecessary,

[illegible]

misleading and could cause confusion even though the instruction also correctly stated defendant's duty. The instruction was approved in Scanlan v. Chicago Union Traction Co., 127 Ill. App. 406, 412, but there was a reason for the instruction in that case. In Kehr v. Snow & Palmer Co., 225 Ill. App. 403, the instruction was approved as correct "applicable to the case." It is not applicable in the instant case.

Defendant's instruction No. 3 told the jury that the law presumes every person will perform duties imposed by law or contract and that the law does not impose the duty to anticipate "negligence in others." This was error since the implication may be that plaintiff was negligent. Also there was no question in the case of a duty imposed by contract.

Defendant's instruction No. 6 informed the jury that "sympathy for the injuries of the plaintiff if any" should not influence the determination of the jury. This statement was sandwiched between two general statements of the necessity of freedom from prejudice. The statement limited to plaintiff made the instruction improper. Rogers v. Mason, 345 Ill. App. 560, 569. The instruction was not approved in People v. Cassin, 322 Ill. 276, nor in Oliver v. Kelley, 300 Ill. App. 487.

Instruction No. 9 required plaintiff to prove that the claimed injuries "really" existed. The instruction was thought proper in Craw v. Chicago City Ry. Co., 159 Ill. App. 100 but disapproved in Alexander v. Sullivan, 334 Ill. App. 42.

There it was held that the word "really" unduly emphasized plaintiff's burden. In Chicago Union Traction Co. v. May, 221 Ill. 530, no complaint was made to a similar instruction. Furthermore there was no question in the instant case whether the principal injuries complained of existed and we think the instruction improper.

Instruction No. 10 told the jury that the question was not whether "during the period in question" plaintiff received compensation, gain or profit from her efforts but whether she was unable to work because of total or permanent disability. This was erroneous. Plaintiff need not have been totally or permanently disabled to recover damages. There was no testimony that plaintiff had received compensation during disability and no definition of the "period in question."

Defendant's instruction No. 18 covered plaintiff's burden of proof and stated, among other things, that if the evidence was "evenly balanced" the verdict should be not guilty. In Healy v. New York Cent. R. Co., 326 Ill. App. 556, it was said that this instruction has been "repeatedly condemned." The authority for the statement is Hughes v. Mendendorp, 294 Ill. App. 424, 431. The authority for the statement in the Hughes case was Wolczek v. Public Service Co., 342 Ill. 482, and Molloy v. Chicago Rapid Transit Co., 335 Ill. 164. The Supreme Court in those cases was considering and criticizing the "although but slightly" instructions. This court in Sankey v. Interstate Dispatch Inc., 339 Ill. App. 420, approved the "evenly balanced" instruction on authority,

1987-1988

...the ... of ...

.. .. .

[illegible]

Handwritten: *Handwritten text, possibly a signature or name, is visible in the right margin.*

• **REPORTING** **GOVERNMENT** **AND** **INDUSTRY**

000

THESE DOCUMENTS SONT LA PROPRIETE DE LA BIBLIOTHEQUE DE LA MAIRIE DE MONTREAL

[illegible]

01 02 03 04 05 06 07 08 09 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 1010 1011 1012 1013 1014 1015 1016 1017 1018 1019 1020 1021 1022 1023 1024 1025 1026 1027 1028 1029 1030 1031 1032 1033 1034 1035 1036 1037 1038

SECRET

10130790 1971 11 10 10130790 1971 11 10

1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673-2674, 2675-2676, 2677-2678, 2679-2680, 2681-2682, 2683-2684, 2685-2686, 2687-2688, 2689-2690, 2691-2692, 2693-2694, 2695-2696, 2697-2698, 2699-2700, 2701-2702, 2703-2704, 2705-2706, 2707-2708, 2709-2710, 2711-2712, 2713-2714, 2715-2716, 2717-2718, 2719-2720, 2721-2722, 2723-2724, 2725-2726, 2727-2728, 2729-2730, 2731-2732, 2733-2734, 2735-2736, 2737-2738, 2739-2740, 27

Journal of Interpersonal Violence 26(10) 1978-1997

State of Georgia, Department of Transportation

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

to: all humans, to: some humans, to: no humans, to: all objects, to: some objects, to: no objects.

1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 26

Journal of Management Education 30(6)p.789-804

Journal of Management Studies, 19(1), 67-80.

Received 10/15/2010; accepted 11/15/2010; published 12/15/2010.

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

Journal of Management Studies, 1998, 35(6), 701-716

among other Supreme Court cases, of Kashnski v. Illinois Steel Co., 231 Ill. 198 where at page 204 the court saw no objection to it.

There was a conflict in the testimony on the issues (a) whether plaintiff exercised due care (b) whether defendant was guilty of negligence or not and (c) whether plaintiff's injuries were proximately caused by the collision. The courts require greater care in instructing juries when there are conflicts of this kind in the testimony. We have pointed out errors in procedure and instructions which were likely to result in an unfair trial for plaintiff. The judgment must be reversed.

Complaint is made that defendant's attorney was guilty of prejudicial conduct by characterizing plaintiff's claims as a "fraud." There was no objection to use of this characterization in the opening argument. In closing argument plaintiff's attorney told the jury that defendant's attorney told them, "he was going to prove she was a fraud." In reply defendant's attorney explained that his opponent had misstated his position and went on to restate that position. We think neither Gordon v. Checker Taxi Co., 334 Ill. App. 313, ^{nor} Rudolph v. City of Chicago, 2 Ill. 2d 370, would justify our concluding that this specific conduct constituted error.

There is nothing to show that alleged "mistreatment" of plaintiff's counsel was reversible error as in Wallin v. Mitchell, 200 Ill. 234. This problem of heated controversy

[illegible]

There is a conflict in the testimony of the
witnesses in the case of the (a) witness
deponent was not at the time of the
plaintiff's injury who probably was not at the time
the cause relative to the cause of the injury
there was conflict in the testimony of the
witnesses and there was no evidence to show that the
plaintiff was not at the time of the injury. The
deponent was not at the time of the injury.

The following information was obtained from the records of the
 Department of the Interior, Bureau of Land Management, and the
 Bureau of Reclamation, regarding the land in question.
 The land in question is located in the State of California,
 and is owned by the United States of America.
 The land is situated in the County of Santa Clara,
 and is bounded by the following sections:
 Section 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 8

can be regulated by the trial court by firm demands for decorum. We see no merit in the contention that defendant's attorney was guilty of serious misconduct in requesting documents from plaintiff's attorney.

The trial court sustained defendant's objection to evidence of what a police officer in the case had testified to in a proceeding in the Criminal Court, which arose out of the instant accident. The excluded testimony is not shown to be impeaching nor the mode of impeachment proper.

The testimony of a C. T. A. employee with respect to a claim by plaintiff for damages in a subsequent accident was competent to contradict plaintiff's testimony that she had no further injuries since the accident in May, 1951. For defendant's purpose it was not necessary that the claim be for similar injuries. A reason for the testimony was to affect plaintiff's credibility and we think the testimony was not too remote for admissibility since the witness testified that plaintiff stated in the claim that she had been in good health prior to the C. T. A. injuries.

There was no prejudice to plaintiff from defendant's attorney questioning a police officer whether statements were made at the scene. The answer was that both parties declined to make statements. This was not the situation in Paliokaitis v. Checker Taxi Co., 324 Ill. App. 21. Complaint is made that the court erred in allowing defendant's attorney to read from a transcript of testimony in closing arguments. The record shows plaintiff's attorney objected and then withdrew his objection.

For the errors in procedure and instructions the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

can be no doubt that the...
...in the...
...the...
...the...
...the...

...the...
...the...
...the...
...the...
...the...

...the...
...the...
...the...
...the...
...the...

...the...
...the...
...the...
...the...
...the...

...the...
...the...
...the...
...the...
...the...

...the...
...the...
...the...
...the...
...the...

(Case No. 232)

Adrienne Falcon and Joseph Falson, Appellants, v.
Albert La Roche, Appellee.

Gen. No. 46,405. (Abstract of Decision.)

TRIAL, § 22 * improper questions to witnesses.

Action of attorney for defendant in injury action in asking defendant's witness irrelevant questions as to whether witness was married and had children, and in subsequently asking defendant identical questions, was error.

First District, Third Division.
December 29, 1954.

1-12-55
received by
for new trial
for Verdict

Error to the ~~Municipal Court of Chicago;~~
Appeal from the ~~Superior Court of Cook County;~~
~~Circuit Court of~~
~~County Court of~~
~~City Court of~~

~~county;~~
~~county;~~

the Hon. Charles E. Byrne, Judge, presiding.

~~Affirmed~~
~~Reversed~~
Reversed and remanded with directions.

Heard in the third division, first district, this court at the June term, 1954.

John G. Phillips, ~~of Chicago,~~ for appellants;

~~for plaintiffs in error;~~

Kirkland, Fleming, Green, Martin & Ellis, ~~of Chicago,~~ for appellee;

Max E. Wildman, John M. O'Connor, Jr., and John J. Edman, of counsel.
~~for defendants in error.~~

Opinion by PRESIDING JUSTICE Kiley.

Not to be published in full. Opinion filed December 29, 1954.

~~rehearing~~

~~denied~~
~~released for publication~~

233

A

4

I.A.^{2d} 113'

46436

ANNA MARIE PIACENTE,

Appellant,

v.

ILLINOIS CENTRAL RAILROAD CO.,
a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment in plaintiff's favor for \$2,000. Plaintiff has appealed.

On June 21, 1948 plaintiff was injured when defendant's northbound electric passenger train in which she was riding collided with another train at the Randolph Street terminal in Chicago. The wheels of the northbound train locked when the brakes were applied and the train skidded about 400 feet before the collision.

Plaintiff contends the verdict is inadequate and against the manifest weight of evidence, and that the court erred in instructing the jury. Defendant assigns no cross error and there is no question before us, therefore, regarding the liability of defendant for its negligent operation of the train.

The court instructed the jury, Defendant's No. 8, that the burden was not on defendant to show it was not guilty of negligence nor that plaintiff was not in the exercise of due care but that plaintiff had the burden of proving defendant's negligence and her own due care. The jury was

-2-

further instructed, Defendant's No. 22, that if it found from the evidence plaintiff was not entitled to recover it would have no occasion to consider the question of damages. Another instruction, Defendant's No. 7, told the jury that if it found plaintiff was injured while a passenger this was not itself any evidence of defendant's guilt nor did it give rise to a presumption of defendant's liability.

The most favorable testimony for defendant was that at the time of the collision the northbound train was going about 3 miles per hour; that the day was humid and rails "sweat"; that the operator felt the wheels "slide" and the "only chance" he had was to apply the brakes "in emergency"; and that the wheels never slid before that. This is not evidence of a defense against the charge of negligent operation of a common carrier.

There being no evidence of a defense the court erred in giving instructions No. 8 and 22. These instructions may have confused and misled the jury into the notion that there could be a question of defendant's liability or of plaintiff's due care or both. Furthermore under the facts in this case instruction No. 8 erroneously stated the burden of proof of negligence. Feldman v. Chicago Railways Co., 289 Ill. 25.

Instruction No. 7 is an erroneous statement of law. Under plaintiff's general charge of "negligent management and control" and the circumstances of the accident a presumption of negligence arose and defendant had the burden of overcoming

-3-

the presumption. Feldman v. Chicago Railways Co., 289 Ill. 25. Giving this instruction was prejudicial error. Pappas v. Peoples Gas Light and Coke Co., 350 Ill. App. 541, 547.

For error in instructing the jury we must reverse the judgment. We agree with plaintiff that the error in these instructions may have raised unjustified doubts in the minds of the jurors, leading to a compromise on the question of liability and damages.

In aid of a new trial we point out that defendant's instruction No. 11 should be coupled with another instruction defining what the material points are. In our opinion plaintiff's instruction No. 20 will not suffice as a definition.

We need consider no other points. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

LEWE AND FEINBERG, JJ., CONCUR.

Anna Marie Piacente, Appellant, v. Illinois
Central Railroad Company, ~~a Corporation,~~
Appellee.

General No. 46,436. (Abstract of Decision)

CARRIERS, § 765 * __instructions when no evidence of defense.
Where there was no evidence of defense in negligence action against
railroad for injuries, instruction which recited ^{that} plaintiff's ^{had} burden
of proving defendant's negligence and plaintiff's own due care and
stated defendant did not have burden of proving defendant was not
negligent or that plaintiff was not in exercise of due care, and in-
struction that occasion to consider question of damages would not
exist if plaintiff was not entitled to recover under evidence, were
improperly given.

1-12-55
Reopened for
new trial
Vol. 4

Error to the ~~Municipal Court of Chicago;~~
~~Superior Court of Cook County;~~
Appeal from the ~~Circuit Court of~~ Cook ~~County Court of~~ county;
~~City Court of~~ county;

the Hon. John E. Pavlik, Judge, presiding.

~~Affirmed~~
~~Reversed~~
Reversed and remanded with directions.

Heard in the third division, first district, this court at the October term, 1954.

Silvio E. Piacenti, Marion J. Hannigan, Edward Wolfe, for appellants;

Edward Wolfe, of counsel; for plaintiffs in error;

Herbert J. Deany, Erle J. Zoll, Jr., Charles I. Hopkins, Jr., for appellees;

and Robert S. Kirby, for appellee; for defendants in error.

Joseph H. Wright, of counsel.

Opinion by PRESIDING JUSTICE Kiley.

Not to be published in full. Opinion filed December 29, 1954. ; rehearing

~~denied~~ ; released for publication

General No. 10811

Agenda No. 44

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D. 1954

FRANK ST. ANGEL,
Plaintiff-Appellee,

vs.

WALTER E. SCHMID and
EDNA C. SCHMID,
Defendants-Appellants.

Appeal from the
County Court of
Winnebago County.

Dove, J.

Plaintiff, Frank St. Angel, brought this action against the defendants, Walter E. Schmid and Edna C. Schmid, husband and wife, in a Justice of the Peace Court in the City of Rockford, Illinois, to recover a real estate commission for selling the defendants' farm located near Wautoma, Wisconsin. Upon an appeal to the County Court of Winnebago County, the case was heard by the court without a jury, resulting in a judgment for the plaintiff for \$500.00 and costs, and it is to reverse this judgment that the defendants appeal.

The evidence discloses that the defendants owned a one-half interest in a 420-acre farm located near Wautoma, Wisconsin: the other one-half interest was owned by defendant Walter E. Schmid's brother and his brother's wife, and their interest is not involved in this controversy. The defendant Edna C. Schmid called plaintiff, who is a licensed real estate

broker in Illinois, in the early part of 1950 and listed the farm in question with him at a figure of \$14,500.00 and agreed that if he would sell the farm for that figure he would be paid a commission of five per cent. There was no written contract concerning the listing of this farm, and it appears that the defendants also listed it with other real estate agents. Plaintiff advertised the farm in the Chicago Tribune on April 8th and 9th, 1950, as well as in other papers, and in response to his advertisement in the Tribune, plaintiff received an inquiry by letter from one Joe Farago in which Mr. Farago asked for details concerning the farm and the improvements thereon. Plaintiff replied to Mr. Farago's letter and gave him all the information he had concerning the farm. Farago stated that he was interested in seeing the farm but could not do so until he returned from a trip to California which he was to make in the early part of May, 1950. After he returned from California, arrangements were made by defendant Walter E. Schmid and plaintiff to drive up to the farm and meet Mr. Farago there, and this was done. Farago inspected the farm and the buildings and then told plaintiff and Mr. Schmid that he wanted to see a friend and get his advice on farm values because he was not familiar with the value of farm land in Wisconsin. Farago took his friend out to see the farm, and his friend advised him not to buy it, but Farago "loved the land," as he himself expressed it, and continued to be interested in purchasing it but not for \$14,500.00. The matter dragged on for several weeks with nothing happening one way or another, although plaintiff testified he was still in contact with Farago,

but that he, Farago, was "cold" on the deal. Plaintiff called on Mr. Farago during the month of June, 1950, when in Chicago and there had a conversation with him in which Farago told him that his wife had just been in a serious automobile accident and that he didn't want to discuss buying the farm at that time.

Defendant Walter E. Schmid wanted plaintiff to go to Chicago with him the latter part of July to call on Farago to see if the deal couldn't be closed at that time, but plaintiff would not go because, as he put it, "Farago is cold and there is no use talking to him any more." During the latter part of August, Defendant Walter E. Schmid went to Chicago alone to see Farago and on this occasion offered to sell Farago the farm for \$12,500.00, but he still would not buy it. About the middle of September, 1950, defendant called Farago and offered him the farm for \$11,500.00, and a few days later Farago came to Rockford, and the deal was closed at that figure. After plaintiff found out the farm was sold, he sent the defendant a bill for \$500.00 commission. Defendant went to see him and told him he did not owe him a commission and would not pay him one but did offer to pay him a "finder's" fee of ten per cent of the whole commission, which amounted to \$57.00 and which plaintiff refused.

Counsel for the defendants insist that the evidence discloses that the plaintiff was employed by them to sell the farm in question for \$14,500.00 and not for a lesser sum; that he failed to sell it for that sum and, therefore, is not entitled to any commission. Under the facts disclosed by this record, this contention cannot be sustained. Where a real estate broker is employed to sell real estate at a specific figure and finds a prospect who is interested in the property but who refuses to

buy it at the figure asked but later purchases the property directly from the owners at a reduced figure, the agent is entitled to his commission on the actual sale price. (Hafner v. Herron, 165 Ill. 242, 250; Smith v. Sears, 160 Ill. App. 240, 242.) Any other rule would permit the owners of property to circumvent their real estate agent by simply reducing the price to the buyer after he had been found by the broker and had refused to purchase at the original asking price. This would be most unjust and inequitable. Having found the ultimate purchaser of the property, the real estate broker is not to be deprived of his commission because the owner negotiates the contract of sale himself or because the owner voluntarily reduces the price of the property in order to effect a sale. (Hafner v. Herron, 165 Ill. 242, 251.)

Counsel for defendants argue that the evidence discloses that the plaintiff abandoned his prospect after he had found him and interested him in the farm, but we do not believe the record sustains this assertion. On the contrary, we find ample evidence that the plaintiff continued to negotiate with Farago from time to time after the listing of this farm had been made with him. These negotiations were carried on by mail, by telephone, and by plaintiff's personally calling on Farago at his Chicago office. Apparently, it was plaintiff's judgment that he would be more successful by letting Farago take his own time with respect to purchasing the farm rather than to keep contacting him every few days, and his judgment in this respect appears to have been well-founded.

The last contention of counsel is that since the plaintiff was not licensed as a real estate agent in the State of Wisconsin he cannot collect a commission for selling real estate that was located in that State, inasmuch as the statute of that State prohibits any person from acting as a real estate broker, either temporarily or otherwise, without first procuring a license, and prohibits the collection of a commission for selling real estate unless the person was so licensed. The record discloses that the contract between the plaintiff and the defendants was made in Illinois, and it was performed in Illinois, and the suit was brought in Illinois. The validity of a contract of this kind is governed by the law of the place where it is made or performed. The remedy is governed by the law of the forum. (*Frankel v. Allied Mills, Inc.*, 369 Ill. 578, 582.)

In 11 Am. Jur., under the subject "Conflict of Laws," page 474, sec. 167, it is stated: "A contract for the sale or lease of land by a real-estate broker is governed by the law of the state of its consummation and its validity is determined by that law, and not by the law of the state where the real estate happens to be situated or by the law of the forum. Hence, if the contract is valid by the *lex loci contractus*, the broker can recover on it, even though by the law of the forum or by the law of the state where the land is situated he may not have secured a license or otherwise complied with regulatory measures." An annotation in 86 A.L.R. at 640 is cited in support of the text. According to the annotation, the determining factor in cases of this character is whether or not the non-complying foreign real estate broker was negotiating merely an isolated transaction or was in reality engaged in the brokerage business

within the state where the real estate was located. The record here shows that this was an isolated transaction on the part of the plaintiff. Plaintiff and defendants were all residents of Illinois, as was Farago, the purchaser, and, aside from the trip to visit the farm in Wisconsin, all of the dealings and negotiations, including the original employment of plaintiff by the defendants, concerning this transaction occurred in Illinois, and the evidence is that plaintiff was licensed as a real estate broker by the State of Illinois.

The judgment of the County Court of Winnebago County is affirmed.

Judgment affirmed.

225

A

46092

4 I.A.^{2d} 133

NORMAN HURFORD,

Appellant,

v.

ROLAND R. HURFORD and FRANCES H.
WAGNER, individually and as trustees;
ROLAND R. HURFORD, individually and
as trustee; HAROLD L. FEIGENHOLTZ,
individually and as trustee; and
BLANCHE H. CALHOUN and JEAN H.
KENNETT,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action by a beneficiary to nullify one trust agreement and the amendment to another, for accountings by the trustees and for other relief. Defendant Feigenholtz individually was dismissed and as trustee filed a counterclaim seeking a declaration of the rights of the parties under the trusts. The issues raised by the pleadings were referred to a Master who recommended a dismissal of the complaint for want of equity and a decree granting the relief sought by the counterclaim. The Chancellor confirmed the Master's report in all respects and entered a decree in conformity with the Master's recommendations. Plaintiff has appealed.

Plaintiff is a brother of defendants Roland Hurford, Blanche H. Calhoun, Frances Wagner, and Jean Kennett. They are all children and only heirs at law of Jennie Hurford and

1914

1915

1916

1917
1918
1919
1920
1921
1922
1923
1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938
1939
1940
1941
1942
1943
1944
1945
1946
1947
1948
1949
1950
1951
1952
1953
1954
1955
1956
1957
1958
1959
1960
1961
1962
1963
1964
1965
1966
1967
1968
1969
1970
1971
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024
2025
2026
2027
2028
2029
2030
2031
2032
2033
2034
2035
2036
2037
2038
2039
2040
2041
2042
2043
2044
2045
2046
2047
2048
2049
2050
2051
2052
2053
2054
2055
2056
2057
2058
2059
2060
2061
2062
2063
2064
2065
2066
2067
2068
2069
2070
2071
2072
2073
2074
2075
2076
2077
2078
2079
2080
2081
2082
2083
2084
2085
2086
2087
2088
2089
2090
2091
2092
2093
2094
2095
2096
2097
2098
2099
2100

1914

1915

1916

1917

1918

1919

1920

1921

1922

1923

1924

1925

1926

1927

1928

1929

1930

1931

Samuel Hurford who died intestate August 25, 1933 and April 6, 1943, respectively.

Feigenholtz at the time of trial was a law partner of Roland Hurford and had been for 25 years.

When the complaint was filed in April, 1950, plaintiff, a World War I veteran, was over 55 years of age. Beginning in 1933 he was in a private sanitarium for 18 months for physical and mental treatment. In April, 1934, he was adjudged insane and committed to the Elgin State Hospital hereinafter referred to as Elgin. On January 15, 1945, he was released under a habeas corpus proceeding. This suit was begun in April, 1950.

On November 30, 1933, plaintiff's father established the Norman Hurford Trust with Roland Hurford and Frances Wagner co-trustees and plaintiff sole beneficiary. The trust was to terminate in twenty years, or within twenty years during plaintiff's life "at any time the co-trustees shall elect," or upon Norman's death. In either of the first two events the trust property was to be "the sole and absolute property" of plaintiff. In the event of termination by plaintiff's death the trust property was to pass to his heirs at law; his brother and sisters. "All costs, expenses and charges necessary" for plaintiff's "support, maintenance, care and comfort" were to be paid from the trust estate.

On December 1, 1933, plaintiff's father established Trust No. 12133 with Roland Hurford, Blanche Calhoun, Frances Wagner, and Jean Kennett beneficiaries of 1/5 interests and

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

... ..
... ..

Frances Wagner and Roland Hurford, co-trustees, of a 1/5 interest for the benefit of plaintiff. This trust was to endure for ten years from December 1, 1933. At termination the trust property, consisting of real and personal property, was to be sold and the proceeds divided among the beneficiaries.

On June 6, 1935 the beneficiaries under Trust No. 12133, executed Trust No. 6635. This was the Hurford Real Estate Trust which closely followed the terms of Trust No. 12133. Several parcels of real estate were conveyed to Roland Hurford, as trustee, for the benefit of the five children who were to share 'equally the proceeds of rentals and sales of the trust property. Roland Hurford and Frances Wagner were named co-trustees of plaintiff's interest. This trust was also to terminate ten years from date, and the proceeds of the sale of the trust property divided among the beneficiaries. Under its terms "all costs, expenses and charges necessary and essential for the support, maintenance and care" of plaintiff were to be paid.

The Norman Hurford Trust and Trust No. 12133 were established by plaintiff's father while plaintiff was in the private sanitarium and Trust No. 6635 was established by plaintiff's brother and sisters while plaintiff was in Elgin.

Under Trust No. 12133, Roland, trustee, was to receive \$150.00 per month for fees and expenses. This trust terminated by its terms December 1, 1943, and plaintiff's one fifth share, amounting to cash and real estate mortgage contracts of about \$60,000.00, was paid into the Norman Hurford Trust. The Hurford Real Estate Trust, No. 6635,

was extended by the beneficiaries, including plaintiff, from June 6, 1945 to September 29, 1950. The Norman Hurford Trust was due to expire by its terms November 30, 1953. The total value of plaintiff's interests in the Norman Hurford Trust and No. 6635 were estimated at the trial at about \$180,000.

April 2, 1947 the Norman Hurford Trust was terminated and Trust No. 4247 was substituted. Feigenholtz was named trustee and his office associate Busch successor trustee. Plaintiff was to be paid \$200 per month for life out of corpus and net income. Should "net income" be insufficient to provide for the "support, maintenance, needs or wants of any beneficiary" the trustee could supply the deficiency from the corpus in his discretion. Upon plaintiff's death his three sisters were to receive the income in equal shares. The trust was to terminate 5 years after plaintiff's death and the assets to be divided equally among the sisters. An amendment was made to Trust No. 6635 substituting Feigenholtz as trustee for plaintiff. The effect of this was to pay, at termination of Trust No. 6635, the distributive share of plaintiff into Trust No. 4247.

Plaintiff's suit seeks to nullify Trust No. 4247 and the amendment to No. 6635. The basis of the action is an alleged conspiracy to defraud plaintiff, and breaches of fiduciary relationships to his injury.

The Master found the trusts valid; no evidence of conspiracy, no fraud or undue influence; that Feigenholtz was not plaintiff's fiduciary at the time of setting up No. 4247; that in view of plaintiff's emotional instability, however, Feigenholtz should have the burden of proving the good faith of the transactions; and that Feigenholtz had met the burden.

At the outset the plaintiff contends the findings of the Master that Trust No. 4247 was the result of plaintiff's deliberate and voluntary act, was drawn in good faith and was fair to plaintiff are not findings of fact but are ultimate conclusions from the evidence. This distinction is presented to avoid the rule binding us where the Master's findings of fact are approved by the Chancellor. That rule limits us to the question of manifest weight of the evidence. Freymark v. Handke, 415 Ill. 360, 365; Derkus v. Vaughan Co., 348 Ill. App. 407, 409.

The conclusions rest upon findings of fact involving determination of credibility of the witnesses. We cannot say, after studying the testimony, that the findings underlying the conclusions are against the manifest weight of evidence. It follows that we cannot set the conclusions based on the findings aside unless they are contrary to law.

It is argued for plaintiff in this court that the record shows contrary to the findings, (a) that Frances Wagner misused her trust by permitting Roland Hurford to absorb her duties and by allowing the creation from plaintiff's estate of an estate for her, (b) that the trust and amendment were the result of undue influence, (c) that the trustees violated their duties to plaintiff by taking advantage of his condition to exact his consent to conditions destructive of his interests and (d) that the absence of necessary independent advice is fatal to the validity of Trust No. 4247 and the amendment to Trust No. 6635.

We think the Master could properly find that Roland Hurford and Frances Wagner performed their trust duties honestly. It is true that Roland Hurford was the dominant trustee and that his sister relied upon his judgment. She said her father wanted Roland to look after the others "like one big family." She executed whatever papers were necessary to her trusteeship and conferred with her co-trustee whenever necessary, and was married to an attorney. In view of our conclusions, stated hereinafter, the fact that she was more or less passive in her service is not important. Though Roland may have made the decisions, she expressed her agreement. There is nothing in the record that suggests she used the trust to further her own interest. She did not seek the \$5,000 trustee's fee. She did not know that she was being named a beneficiary in Trust No. 4247. She actually knew little if anything of the circumstances surrounding No. 4247. The case of Bennett v. Weber, 323 Ill. 283, plainly does not apply to Frances Wagner. She did not attempt to take any trust property without the consent of the other beneficiaries. Neither is Lord Eldon's rule set forth in Addis v. Grange, 358 Ill. 127, at page 134 applicable to her. There is no finding that her benefit came through a "corrupt channel." Nor for the same reason does Sec. 333, Comment (d), Restatement of Trusts apply. We see no merit to the contention that Frances Wagner misused her trust.

The Master found that plaintiff knew fully the nature and effect of the instrument he signed on April 2, 1947;

that he was advised beforehand of the terminal date of the Norman Hurford Trust; that he had, in 1945, made a will designed to take from his brother the contingent interest under that trust and leaving his estate to his sisters: that he knew he could not legally remove his brother nor break the trust: that he made the agreement and signed the amendment willingly: that the transaction was equitable and fair, and plaintiff knew it was in his best interest: that though the monthly allowance seemed inadequate other provisions compensated in the light of plaintiff's weaknesses; and that since 1947 plaintiff has received about \$3,500 a year.

Plaintiff was discharged from Elgin over the objections of Roland Hurford and Frances Wagner who were co-conservators of his estate. Feigenholtz represented them. After plaintiff's discharge the Probate Court of Winnebago County appointed a guardian ad litem for him. On two occasions while plaintiff's affairs were under the supervision of that court, Roland Hurford's books and records respecting the trusts were examined -- first they were examined by plaintiff's attorney and then by plaintiff, the attorney and guardian. Plaintiff expressed satisfaction with the records and the attorney and guardian reported to the court commending the trustee's records and management.

A dispute had arisen between plaintiff and his attorney about attorney's fees. An attorney's lien was filed in the conservators estate. Plaintiff asked Feigenholtz to defend the estate against the lien. Feigenholtz refused to

act as attorney but did act as arbitrator. The claim of \$11,500 was settled for \$4,000 and Feigenholtz received a fee of \$1,000.

The co-conservators made their final account and distributed about \$20,000 in cash and bonds to plaintiff before their discharge. After receiving the assets of the co-conservators estate, plaintiff commenced a life of dissipation. The assets were exhausted in several months. He became involved in an ill-fated tavern venture with questionable characters. Feigenholtz represented him and with the aid of a \$3,000 loan from the Norman Hurford Trust eventually salvaged part of plaintiff's investment. Feigenholtz was paid \$1,100 for his legal services.

Plaintiff had a violent dislike for his brother Roland. He blamed Roland for his confinement in the institutions and for his financial plight. He was determined to rid himself of Roland's trust supervision. He sought the aid of Feigenholtz who reluctantly discussed the matter with Roland. Roland laid down conditions which had to be fulfilled if he were to step out as trustee: The Norman Hurford Trust would be terminated; a new irrevocable trust would be established to hold plaintiff's interests; a corporate trustee would be appointed to succeed Roland; a \$5,000 fee would be paid to Frances Wagner and a like fee to Feigenholtz, for their services as trustee and attorney respectively in administering that trust. Plaintiff agreed to all conditions except that respecting the corporate trustee. At his request Feigenholtz was named trustee.

1. The first of these is the fact that the
2. The second is the fact that the
3. The third is the fact that the
4. The fourth is the fact that the
5. The fifth is the fact that the
6. The sixth is the fact that the
7. The seventh is the fact that the
8. The eighth is the fact that the
9. The ninth is the fact that the
10. The tenth is the fact that the

[illegible]

Plaintiff was told that Feigenholtz had a poor opinion of him but insisted upon having Feigenholtz as trustee. He was told when the Norman Hurford Trust would expire and what he stood to gain by waiting. He knew of Feigenholtz' relationship with Roland and the Norman Hurford Trust. He was told to get outside counsel and independent advice. He was offered aid in getting other attorneys. He wanted Feigenholtz to draft the trust instrument. He said the drafts were examined by other attorneys who were satisfied. He suggested changes. He named the beneficiaries and chose the trustees. The trust instrument was read to him and explained to him, and there was about a month between the making of the trust instrument and the transfer of the assets into the trust. These facts are "factors important in determining" that Trust No. 4247 and the amendment to Trust No. 6635 were fair and just transactions. Jones v. Washington, 412 Ill. 436, 441.

The assets of the Norman Hurford Trust were turned over to plaintiff after an audit had been made at Roland Hurford's insistence. Plaintiff took possession of the assets and turned them over to Feigenholtz as trustee. He endorsed checks to Feigenholtz as trustee of No. 4247 and as counsel to the Norman Hurford Trust.

In Dombrow v. Dombrow, 401 Ill. 324, the fiduciary profited by his position and failed to prove the grantor had independent advice. Here Roland Hurford lost rather than gained: Frances Wagner did not know she had gained until

after the transaction; and what gain Feigenholtz had was not out of the transaction. Neither the Dombrow case or Curtis v. Fisher, 406 Ill. 102 help plaintiff here. The fees paid Feigenholtz were for services to trustees of the Norman Hurford Trust. These would in all likelihood have been paid in any event at the expiration of that trust.

It is argued that because of plaintiff's weakness he was easily dominated and that his apparent free action with respect to No. 4247 was actually the result of "influence ruthlessly wielded." Assuming, without deciding, that Roland Hurford's fiduciary influence carried over after the termination of the Norman Hurford Trust, McParland v. Larkin, 155 Ill. 84, 87, we think the record justified the finding that there was no undue influence used on plaintiff in establishing Trust No. 4247 and the amendment to Trust No. 6635.

The Master found that plaintiff was normal and of high intelligence, but frequently governed by emotion rather than calm judgment, easily influenced by others, foolhardy in placing confidence and given to plans without prudent foresight. We think the Master's appraisal of plaintiff, approved by the Chancellor, was not erroneous. There is no analogy between the condition of plaintiff and that of the sick old man in Works v. McNeill, 1 Ill. 2d 47. The record here indicates that plaintiff through Feigenholtz was influencing Roland to resign as trustee. He rejected the corporate trustee idea. He had previously in a will made his sisters beneficiaries under his will and at the trial mutual

-11-

affection was expressed between him and them. The monthly allowance was about \$50.00 more than he was previously getting and he presumably was satisfied that his material wants would be cared for. There was ample evidence that the trust was as he wanted it.

We think the requirements of the rule stated in Hensan v. Cooksey, 237 Ill. 620, are satisfied by this record. There the property transaction between an aged mother and her beneficiary son was "carefully kept secret" and the son took her away from the other members of the family instead of seeing that she had independent advice. Here plaintiff was urged to get independent advice and stated he had had it and the facts justified the Master and Chancellor concluding plaintiff was not imposed upon, that the transaction was had in good faith, was equitable and was in plaintiff's best interest.

There is no reason to discuss In re Bond & Mortgage Guarantee Co., 303 N. Y. 423, since the Master assumed, for purpose of discussion, Feigenholtz was a fiduciary. With respect to Feigenholtz as attorney, the findings of the Master, approved by the Chancellor, satisfy the requirements stated in Roby v. Colehour, et al, 135 Ill. 300, at page 341. Here the findings were against the claim of bad faith, undue influence, lack of knowledge and lack of freedom of action by plaintiff or withholding information and acting against plaintiff's interest.

The claim is made that the injustice to plaintiff from this transaction is so grave and palpable as to constitute

fraud. On this point, the finding was that though the monthly allowance seemed inadequate, the other provision for his care and need adequately provide for him and are fair in view of his weaknesses.

During 1947, 1948, and early 1949, plaintiff made no complaint about Trust No. 4247. He received income of almost \$3,600 per year. Since the trust appears to have a value of about \$180,000 one might wonder whether plaintiff should not be treated with greater generosity, but that question is not before us. The suit does not seek a greater income from the trust. There is no evidence that plaintiff's material wants and comforts were not satisfied. There are recitals in Trust No. 4247 of plaintiff's acknowledged profligacies and weaknesses of character. It is argued for plaintiff that if these recitals are true the facts should have moved those interested in him to aid in his rehabilitation. There is no evidence that Roland Hurford or plaintiff's sisters or Feigenholtz made any attempt to help plaintiff in a spiritual way or that any attempt to do so was futile.

The Master found that Roland Hurford had the right to lay down the conditions preparatory to terminating the Norman Hurford Trust, and that plaintiff had access to all the trust records and had never complained nor demanded an accounting until he employed attorneys in July 1949.

Roland Hurford was the older brother and dominant trustee of the Norman Hurford Trust which contained a spend-

thrift provision. For twelve years of the life of that trust plaintiff was in mental institutions. Plaintiff attributed his confinement at Elgin to "railroading" by his brother. This state of mind was undoubtedly sharpened by the opposition of Roland to plaintiff's release and "restoration." Nothing appears to show that Roland could have done anything but what he did as co-conservator while plaintiff was confined. He conserved the assets of the Norman Hurford Trust during those years, some very difficult years, and participated in setting up Trust No. 6635 to include plaintiff as beneficiary. Nothing indicates he acted to confine plaintiff. The husband of Frances was the petitioner for confinement and this occurred while the father was living. Roland's conservator records were kept conscientiously and the assets turned over to plaintiff. Plaintiff's shares of the income and proceeds of the trusts were paid into the conservatorship and Norman Hurford Trust accounts. He approved an advance of \$3,000 from the Norman Hurford Trust to help him in the ill-fated tavern venture. There is nothing to show that plaintiff was not getting what was due him under his father's direction to the co-trustees. Roland was bound by the terms of the trust until November 30, 1953. There is nothing to show that the records of this trust were not kept honestly and conscientiously.

...

But plaintiff "hated" Roland. In 1945 plaintiff sought by will to eliminate him as a contingent beneficiary under the Norman Hurford Trust. He was driven by the desire to remove Roland from supervision of his estate. He said he wanted more money, however, what was provided under No. 4247 was only about \$50.00 more per month than he had been receiving. He wanted to get rid of Roland as trustee. He knew Feigenholtz was close to Roland and sought Feigenholtz' aid.

Roland Hurford and Frances Wagner had the responsibility of administering the Norman Hurford Trust until November 30, 1953, or the responsibility of terminating it before that date. In terminating the trust the co-trustees were charged with the responsibility of choosing the time, and conditions under which termination could take place. Certainly plaintiff was not to control the termination. Nor would the co-trustees be true to this trust, containing a spendthrift provision, if they, for no good reason, abdicated as trustees to satisfy plaintiff. Plaintiff could have waited until November 30, 1953 for the expiration of the trust and the sole ownership of the trust property.

Accordingly when the question was brought to Roland he had the obligation to use his best judgment in the light of the responsibility imposed by the Norman Hurford Trust. He did not designate his partner Feigenholtz, he wanted a corporate trustee. He insisted on an irrevocable trust to curb plaintiff in what appeared to be a drive to thwart the Norman Hurford Trust. He asked for trustee fees for Frances Wagner and counsel fees for Feigenholtz. We think the Master

and Chancellor did not err in concluding that Roland Hurford rightfully laid down these conditions. We think that the Master and Chancellor were justified in inferring that Roland was determined to preserve the "true spirit" of his trust, and satisfied the rule restated in Humpa v. Hedstrom, 341 Ill. App. 605. The conditions laid down were in plaintiff's interest as Roland saw it and not a bargain as in In re Ahrens' Estate, 71 N. Y. S. 2d 462. We see no substance in the argument that Roland Hurford was a "huckster". He gained nothing. We think the finding with respect to the conditions laid down by Roland Hurford was justified.

Plaintiff's prayer for an accounting from the trustees was denied and he claims this was error. The Master found plaintiff had access to Trust No. 4247, books and records at all times: was furnished with income tax reports and with audit reports of said trust, and that he never complained of mismanagement and never demanded an accounting. The finding is amply supported by the record.

The plaintiff's attorney, his guardian and plaintiff examined Roland Hurford's trustee's books and records and the reports were made of the good records and good management. Before turning over to plaintiff the assets of the Norman Hurford Trust, Roland Hurford had an audit made which was given plaintiff. There were introduced in evidence audit reports of Trust No. 4247 as of April, 1947, August 31, 1949 and December 31, 1949. Copies of these had been supplied to plaintiff. He was informed by Roland that the trust books were open to him at any time. He had, himself, checked into

some records of Trust No. 4247. He made investigations and appraisals of some of the real estate assets.

There was no error in the findings under these circumstances. Wylie v. Bushnell, 277 Ill. 484, 491. We think the court was justified in concluding that the defendants met the burden of fiduciaries to keep regular and accurate accounts of the trust affairs and that the accounts should be open at all times to the inspection, on demand, of the beneficiary. Wylie v. Bushnell, 277 Ill. 484, 507; But compare, Conant v. Lansden, 341 Ill. App. 488, 500, 501 (4th Dist.).

For the reasons given the decree is affirmed.

DECREE AFFIRMED.

LEWE, J. CONCURS.

FEINBERG, J. TOOK NO PART.

[illegible]
$$f_{\text{max}} = \frac{1}{2\pi} \sqrt{\frac{1}{L C_{\text{eff}}}} = \frac{1}{2\pi} \sqrt{\frac{1}{L (C_1 + C_2)}} \quad (1)$$

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

[illegible]

THE UNITED STATES OF AMERICA

100

[illegible][illegible]

(Case No. 225) Norman Hurford, Appellant, v. Roland R. Hurford and Frances Wagner, Individually and as Trustees et al., Appellees.

Gen. No. 46,092. (Abstract of Decision.)

TRUSTS, § 298 * grounds for setting aside.
Trust which was executed as substitute when trust under which plaintiff was sole beneficiary was terminated at plaintiff's instigation, ~~in action of co-trustees who were plaintiff's brother and sister~~, which substituted trust provided for payment to plaintiff of specified sum monthly and for plaintiff's sisters ^{to receive income} after plaintiff's death, and amendment of another trust of which plaintiff was a beneficiary, the effect of which amendment was to pay plaintiff's distributive share at termination thereof into substitute trust, were properly not nullified on grounds of conspiracy to defraud plaintiff and breaches of fiduciary relationship to plaintiff's injury ~~by an attorney and the trustees of terminated trust.~~

Received in mail July 6 1953

~~Error to the~~ Municipal Court of Chicago;
~~Appeal from the~~ Superior Court of Cook County;
~~Circuit Court of~~
~~County Court of~~
~~City Court of~~

county;
county;

the Hon. John C. Lupe, Judge, presiding.

~~Affirmed~~ Decree affirmed.
~~Reversed~~

~~Reversed and remanded with directions:~~

Heard in the third division, first district, this court at the June term, 1953

Eugene C. O'Reilly, Gregory L. Walker, and Perlman, Goodman, Mecht & Chesler,
~~all of Chicago,~~ for appellants;

~~counsel;~~ for appellant; Theodore E. Rein, and Ernest A. Braun, of
~~counsel;~~ ~~for plaintiffs in error;~~
Kirsch E. Soble, Roland R. Hurford, and Lester L. Koenigsberg,

for appellees;

for defendants in error.

Opinion by PRESIDING JUSTICE Kiley.

Not to be published in full. Opinion filed December 15, 1954.

; rehearing

~~denied~~ ; released for publication

226
A
46305

CERNY-PICKAS & COMPANY, a corporation,
and ORIENT INSURANCE COMPANY, a
corporation,

Appellees,

v.

C. R. JAHN COMPANY, a corporation,

Appellant.

4 1A^{2d} 134

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered against it upon the verdict of a jury, in an action for property damage arising out of a fire in premises leased by plaintiff to defendant. Upon a former appeal of this case (347 Ill. App. 379), we reversed the judgment in favor of defendant, entered on the pleadings only, and remanded the cause for a trial on the merits of the issues raised by the pleadings. It becomes necessary upon this appeal, for a better understanding of the questions raised, to set forth the pertinent provisions of the lease, upon which defendant bases its principal defense.

The Orient Insurance Company was joined as a plaintiff as subrogee of its co-plaintiff, to recover the amount paid out by it on the policy of insurance covering the damage in question. For convenience, we shall refer to Cerny-Pickas & Company, the principal plaintiff, as lessor, and the defendant as lessee.

Lessor entered into a lease with lessee for the premises described therein, together with certain machinery and equipment in said premises. The pertinent provisions

... ..
... ..
... ..

... ..

...

... ..
... ..
... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

of the lease, bearing upon the questions raised on this appeal, are:

"2. * * * Lessee will keep said premises, including all appurtenances, in good repair, * * * and upon the termination of this lease, in any way, will yield up said premises to Lessor in good condition and repair (loss by fire and ordinary wear excepted) * * *.

"3. Lessee will not allow said premises to be used for any purpose that will increase the rate of insurance * * * and will not permit said premises to be used for any unlawful purpose * * * or increase the fire hazard of said building * * *.

"8. Lessor shall not be obliged to incur any expense for repairing any improvements upon said demised premises or connected therewith save as in this clause provided, and the Lessee at his own expense will keep all improvements otherwise in good repair (injury by fire, or other causes beyond Lessee's control excepted) as well as in a good tenantable and wholesome condition, and will comply with all local or general regulations, laws and ordinances applicable thereto * * *.

"14. Lessor shall pay for fire insurance on the building and equipment and machinery hereby leased, and Lessee agrees to pay for any increase in fire insurance premium on such insurance policies, due to any increase in the insurance rate due to the nature of Lessee's business, or the manner of its conduct of the business.

"16. Lessee agrees that at the expiration of this lease, said leased premises, machinery and equipment shall be returned in good condition, ordinary wear and tear excepted. Said Lessee shall have the right to install * * * additional toilet facilities * * *.

"18. * * * said Lessee shall restore said premises, at the expiration of this lease, to the same condition as at the time of entry into possession under this lease, ordinary wear and tear excepted." (*Italics ours.*)

It is alleged in the complaint that lessee negligently erected certain partitions in the building, installed a bath and toilet room enclosed by said partitions, installed a gas water heater in said bathroom or toilet room-- all in

1. The first step is to identify the problem. This involves understanding the symptoms and the context in which they are occurring.

The following information is being furnished to you for your information only. It is not intended to be used for any other purpose. The information is being furnished to you for your information only. It is not intended to be used for any other purpose. The information is being furnished to you for your information only. It is not intended to be used for any other purpose.

The Council of the League of Nations, in its resolution of 1920, established the League of Nations, which was the first international organization to be created since the end of the First World War. The League of Nations was created to maintain world peace and to prevent future wars. It was the first time that nations had agreed to work together to maintain peace. The League of Nations was the first international organization to be created since the end of the First World War.

[illegible]

...the
... ..
... ..
... ..
... ..

1. The first step is to identify the problem. This is done by asking the following questions: What is the problem? Why is it a problem? How is it affecting the organization? What are the causes of the problem? What are the symptoms of the problem? What are the consequences of the problem? What are the stakeholders involved in the problem? What are the resources available to solve the problem? What are the constraints on solving the problem? What are the risks of not solving the problem? What are the opportunities for solving the problem? What are the goals for solving the problem? What are the objectives for solving the problem? What are the key performance indicators for solving the problem? What are the metrics for solving the problem? What are the benchmarks for solving the problem? What are the standards for solving the problem? What are the best practices for solving the problem? What are the lessons learned from solving the problem? What are the best practices for preventing the problem from recurring? What are the best practices for improving the organization's performance? What are the best practices for managing the organization's resources? What are the best practices for managing the organization's risks? What are the best practices for managing the organization's stakeholders? What are the best practices for managing the organization's reputation? What are the best practices for managing the organization's culture? What are the best practices for managing the organization's environment? What are the best practices for managing the organization's future? What are the best practices for managing the organization's success? What are the best practices for managing the organization's failure? What are the best practices for managing the organization's change? What are the best practices for managing the organization's innovation? What are the best practices for managing the organization's growth? What are the best practices for managing the organization's sustainability? What are the best practices for managing the organization's social responsibility? What are the best practices for managing the organization's ethical behavior? What are the best practices for managing the organization's legal compliance? What are the best practices for managing the organization's financial performance? What are the best practices for managing the organization's operational efficiency? What are the best practices for managing the organization's customer satisfaction? What are the best practices for managing the organization's employee engagement? What are the best practices for managing the organization's leadership effectiveness? What are the best practices for managing the organization's strategic vision? What are the best practices for managing the organization's competitive advantage? What are the best practices for managing the organization's market position? What are the best practices for managing the organization's brand identity? What are the best practices for managing the organization's corporate governance? What are the best practices for managing the organization's risk management? What are the best practices for managing the organization's crisis management? What are the best practices for managing the organization's business continuity? What are the best practices for managing the organization's disaster recovery? What are the best practices for managing the organization's information security? What are the best practices for managing the organization's data privacy? What are the best practices for managing the organization's intellectual property? What are the best practices for managing the organization's human capital? What are the best practices for managing the organization's physical capital? What are the best practices for managing the organization's financial capital? What are the best practices for managing the organization's social capital? What are the best practices for managing the organization's cultural capital? What are the best practices for managing the organization's natural capital? What are the best practices for managing the organization's human capital? What are the best practices for managing the organization's physical capital? What are the best practices for managing the organization's financial capital? What are the best practices for managing the organization's social capital? What are the best practices for managing the organization's cultural capital? What are the best practices for managing the organization's natural capital?

On 10/10/1964, the following information was received from the Bureau of the Census, Washington, D.C.:

-3-

violation of certain ordinances regulating the construction of such partitions and the installation of said gas water heater; and that said negligence and violation of the ordinances was the proximate cause of the fire.

Lessee's principal defense upon the question of liability is that the provisions of the lease exempt it from the duty to return the premises to lessor at the termination of the lease in case of fire, and that such exculpatory provisions bar recovery, relying chiefly upon Jackson v. First National Bank, 415 Ill. 453, and cases there cited, which we shall presently discuss.

Defendant also urges that the provisions of the lease with respect to insurance covering the premises plainly import an intention of the parties that lessor, in the event of loss of property by fire, should look solely to the insurance protection for recovery, and not to the lessee, regardless of whether the fire was caused by the alleged negligence of the defendant.

If the evidence, and all reasonable inferences to be drawn therefrom favorable to plaintiff, tends to prove the charge in the complaint, then the trial court was justified in denying the motions to direct a verdict and to enter judgment in favor of defendant notwithstanding the verdict. If the judgment entered is not against the manifest weight of the evidence, we are not justified in disturbing the verdict.

The evidence discloses that the building in question was a one-story industrial building, intended for heavy

manufacturing purposes, and consisting of several contiguous units. Defendant took possession of the building on May 1, 1943, and remained in possession until the fire, April 22, 1945. Defendant had a contract with the government for the manufacture of heavy duty trailers for use during the war. A government inspector, assigned to inspect the operation of the plant, was there when defendant took possession of the premises, and testified that by his direction defendant made certain physical improvements to better the working conditions within the leased premises.

It further appears that in conformity with the direction of the government inspector, defendant constructed a combination locker room and washroom, which later was taken down and a second one built. In the corner of the area called the locker room and washroom was a toilet, enclosed within four brick walls. Within this washroom defendant installed showers for use of the men, a hot water heater in the corner of the washroom, and additional toilet facilities. The hot water heater, it appears, was installed by a carpenter, who was not a plumber, and who connected the water heater ventilating pipe to a forge pipe which led to the chimney. Three sides and the ceiling of the men's washroom were constructed of wood 2 x 4's covered with plywood and celotex. These partitions are governed by Section 61-70 of Chapter 61 of the Municipal Code of Chicago, which requires solid partitions or hollow partitions of wood studs covered with "incombustible surface material." It appears from the evidence that the partitions in question were not covered with incombustible surface material, as required by the ordinance.

It is undenied that no permit required by ordinance was obtained for the installation of the gas hot water heater. Chapter 80, §24.6 of the Municipal Code provides:

"No domestic gas hot water heater shall be installed in any bathroom or toilet room."

Defendant's contention that these ordinances do not apply is without merit, since there is evidence that showers for bathing purposes were installed in the men's washroom, enclosed by these partitions, as well as the additional toilet facilities, and that such constitute a bathroom or toilet room within the meaning of the ordinance. Likewise, the partitions erected were not in compliance with the ordinance governing partitions.

Defendant earnestly argues that the provisions of the lease bar recovery for loss or injury to the property due to fire. Jackson v. First National Bank, supra, and cases there cited, as well as cases from other jurisdictions relied upon by defendant in support of its contention, are readily distinguishable. The exculpatory clause in the Jackson case specifically provides that lessor shall not be liable for loss or injury to lessee's property on account of the negligence of the lessor or its agents. The instant lease does not refer to loss or injury to the property through any negligence of the lessee, and there is no specific exemption of liability on account of negligence. Contracts exempting liability for negligence are not favored by the law. They are strictly construed against the party relying on them, and clear and explicit language in the contract is

11

required to absolve a person from such liability. 17 C. J. S. §262, and cases there cited. The cases cited and relied upon by lessee support this principle of law. We said in our former opinion in construing this lease (p. 387):

"The language in the instant lease does not expressly or impliedly exempt defendant from liability on account of negligence or alleged violation of a positive duty imposed by the ordinances."

The Jackson case did not involve a charge that the violation of an ordinance or a duty imposed by law was the proximate cause of the fire. The charge there was only ordinary negligence, against which the court determined the specific exemption in the exculpatory clause barred recovery.

All the provisions of the lease must be read together to arrive at the intention of the parties. Clause 2 of the lease merely requires that the lessee, at the termination of the lease, return the property and machinery in good condition and repair (loss by fire and ordinary wear excepted). No exemption is therein made for loss or injury to property through any negligence of the lessee, as in the Jackson case. Clause 8 of the lease requires the lessee, at his own expense, to keep all improvements in good repair (injury by **fire or other causes beyond lessee's control excepted**), and (lessee) will comply with all local or general regulations, laws and ordinances applicable thereto.

In our former opinion we construed the language of this clause to mean that if the fire was not beyond lessee's control, it did not come within the exception provided. The question then arises, was the proximate cause of the fire within the control of the lessee?

The above is a summary of the information received from the various sources mentioned above. It is to be understood that the information is not complete and that further investigation is required to determine the exact nature and extent of the problem. The information is being furnished to you for your information and for your use in the conduct of your duties. It is to be understood that the information is not to be used for any other purpose without the express written consent of the Bureau.

There was evidence, the credibility of which was for the jury to determine, that after the fire, the hot water heater was examined by a witness, who qualified as an expert. He found a considerable accumulation of carbon on the burner of the hot water heater; that the flues were plugged with carbon; that the base was rusted and part of it burned out at the bottom; that because of the condition in the flues and around the burners, the hot water heater could overheat; that the accumulation of carbon could cause a down draft, drawing gas fumes down instead of out, and in his opinion the heater, as he saw it, had not been in proper condition to be operated; that when enough carbon got on the bottom of the heater the fumes would not "let out," the bottom of the heater would get hot, and that it could cause the flames to start spreading out. Another witness, qualified as an expert, who also examined the heater, corroborated the testimony of the other witness.

We are convinced from an examination of the testimony that the gas hot water heater was installed within a bathroom or toilet room too close in proximity to the wood partitions, in violation of the ordinance applicable thereto, and that the excessive heat from the hot water heater and the down draft, which caused the flames to spread outwardly, caused the fire. The conditions, within the control of the lessee, which induced the fire, could reasonably have been avoided, had the lessee performed its duty required by the lease to comply with all local or general regulations, laws and ordinances applicable to the erection of the partitions and the installation of the gas hot water heater in the bathroom or toilet area in question.

Where there is no eyewitness to the cause of a fire, proof of the cause of such fire must necessarily rest upon circumstances and all reasonable inferences to be drawn therefrom. Lindroth v. Walgreen Co., 338 Ill. App. 364, affirmed 407 Ill. 121; Dixon v. Montgomery Ward & Co., 351 Ill. App. 75; Holland Furnace Co. v. Rollman, 20 Atl. 2d 500. These cases involved the question of sufficiency of proof of circumstances as to the cause of a fire.

Where uncertainty arises as to the inference that may legitimately be drawn from the evidence, so that fair-minded men may honestly draw different conclusions, the question is not one of law but one of fact to be settled by the jury. Plodzien v. Segool, 314 Ill. App. 40, and cases there cited.

Lessee's further contention that the provisions of clause 14 of the lease must be construed to mean that lessor was compelled to look to the fire insurance, and not to the lessee, for any loss or injury to the property is without merit. The provision in clause 14, wherein lessor was to pay for the fire insurance and lessee "agrees to pay for any increase in fire insurance premium on such insurance policies, due to any increase in the insurance rate due to the nature of Lessee's business, or the manner of its conduct of the business," does not support lessee's contention. It would be illogical to construe this language to unqualifiedly obligate the lessee to pay the increased rate if the lessor carried no insurance. We think plainly it was the intention of the parties that if the lessor carried insurance, and

the lessee's conduct of the business increased the rate, that such increase should be paid by the lessee -- hence, the reference in the provision of clause 14 that the lessor shall pay for fire insurance. Had the parties intended that the lessor should look to the insurance only, and not to the lessee, it would have been a simple matter for the parties to express such intention in the lease. Lipton v. Pennsylvania Rubber Co., 1 Ill. App. 2d 223 (Abst.).

Lessee further contends that the instructions given for plaintiff, referring to the ordinances governing the erection of partitions and the installation of the gas hot water heater, was reversible error, because the ordinances were inapplicable. What we have said, we think, disposes of this contention.

The trial court correctly refused to direct a verdict for lessee and to enter judgment notwithstanding the verdict. There was no error in denying the motion for new trial. We find no reversible error in the rulings on evidence and refusal to give certain instructions tendered by lessee. No point is raised as to the pleadings or the amount of the judgment.

The lessee had a fair trial, and the judgment is accordingly affirmed.

AFFIRMED.

KILEY, P.J. AND LEWE, J., CONCUR.

The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket I had been sitting under. I looked up at the sky, which was a deep, dark blue, and I felt a sense of peace. The stars were visible, and I knew that I was in a good place. I took a deep breath and felt the cool air fill my lungs. I was alone, but I felt like I was part of something bigger. I was in the middle of nowhere, and I was exactly where I needed to be.

1995-1996

Journal of Management Education 30(6)

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

(Case No. 226) Cerny-Pickas and Company, and Orient Insurance Company,
Appellees, v. C. R. Jahn Company, Appellant.

Gen. No. 46,305. (Abstract of Decision.)

LANDLORD AND TENANT, § 279 * evidence in action for injury to premises.

Evidence established that tenant of industrial building installed gas
hot water heater within a bathroom too close in proximity to wood partitions,
in violation of city ordinance, and that excessive heat from heater, and
downdraft, caused fire, and landlord was entitled to recover from tenant
damage resulting from fire where lease did not exempt tenant from liability
if fire was not beyond tenant's control.

Error to the Municipal Court of Chicago;
Appeal from the Superior Court of Cook County;
Circuit Court of
County Court of
City Court of

county;
county;

the Hon. George M. Fisher, Judge, presiding.

Affirmed ☉

~~Reversed~~

~~Reversed and remanded with directions~~

Heard in the third division, first district, this court at the April term, 1954

Clausen, Hirsh & Miller,

for appellants;

~~for plaintiffs in error;~~

Nohelty,

for appellees;

Edward J. Bradley, Edward S. Coath, and Katherine

~~for defendants in error.~~

Opinion by ~~PRESIDING~~ JUSTICE Feinberg.

Not to be published in full. Opinion filed December 15, 1954.

~~; rehearing~~

~~denied~~; released for publication

227

A

11

46320

4 I.A.^{2d} 164

RUSSELL W. BORROWDALE,

Appellant,

v.

BENJAMIN SUGARMAN, doing business as
CONSOLIDATED PHOTO ENGRAVERS EQUIPMENT
COMPANY and CONSOLIDATED PHOTO
ENGRAVERS EQUIPMENT COMPANY, an
Illinois corporation,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered on the verdict of a jury in favor of defendants in an action to recover damages resulting from breaches of oral contracts. Plaintiff's motion for a new trial was denied. A judgment in favor of plaintiff in a former trial was reversed by this court and the cause remanded for a new trial. (347 Ill. App. 390.)

There was evidence that: In August 1944 defendant Sugarman began the development of a large commercial camera used primarily in the printing business. He employed an experienced designer of commercial cameras, one Max Sussin, who produced the first camera, called consolidated precision 24" camera. Early in April 1945 plaintiff placed a blind advertisement in a Chicago newspaper which reads, "Have 22 years as creative engineer and as executive for printing equipment mfg. corp. Would like to prove ability. Start at \$7500." Upon receipt of defendants' response to this advertisement plaintiff came to Sugarman's place of business

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1895

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
1895

1895

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1895

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1895

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1895

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1895

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1895

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1895

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1895

-2-

where they discussed the terms of plaintiff's employment. The testimony of plaintiff and Sugarman with reference to the terms of employment is in sharp conflict. Plaintiff claims that Sugarman agreed to pay him \$25,000 for each of the four camera models produced by plaintiff and that he was to be allowed a weekly drawing account which would be applied "against my total of \$25,000 per model." According to Sugarman's testimony he told plaintiff at their first meeting that his salary would be \$100 a week for a trial period of four weeks, after which he would give plaintiff an increase or discharge him. Plaintiff commenced work about April 5, 1945. It is uncontroverted that plaintiff received from Sugarman \$100 weekly from April 5, 1945 to May 3, 1945; \$125 weekly from May 3, 1945 to November 8, 1945; \$135 weekly from November 8, 1945 to June 6, 1946; and \$165 weekly from June 20, 1946 until February 13, 1947, when plaintiff's employment was terminated. During the period of plaintiff's employment federal income withholding taxes and federal security taxes were deducted each week from plaintiff's salary checks. When plaintiff was employed by Sugarman he had had no experience in design or manufacture of cameras. The design and patterns of the consolidated precision 2 1/2" camera were substantially completed when plaintiff was employed and it was delivered to a purchaser on August 8, 1945. The production of the first 2 1/2" standard camera was commenced in September or October, 1945, and it was completed and ready for shipment about the middle of

-3-

January, 1946. The 31" standard camera was sold February 23, 1946 and the 31" precision camera ordered by one of Sugarman's customers in March 1946 was completed and delivered on July 29, 1946.

The gist of the original verified complaint consisting of one count, filed less than three weeks after plaintiff's employment terminated, was that plaintiff had been employed under a parol agreement on April 1, 1945 for a period of five years as a mechanical and industrial engineer in the operation, management and development of defendants' business of manufacturing large cameras at an "annual salary" beginning at \$7500 to be increased \$10,000 "per year" when the first fifty cameras then being designed would be manufactured and sold, and an additional \$5,000 per year for each additional fifty cameras manufactured and sold by defendants. This complaint was stricken on defendants' motion. April 7, 1947 plaintiff filed an amended complaint substantially the same as the former complaint, which was also dismissed on defendants' motion.

June 19, 1950 plaintiff filed his verified second amended complaint consisting of two counts. The second count was removed from the case by our decision in the former appeal (347 Ill. App. 390.) The first count of the second amended verified complaint and the verified amendment thereto allege substantially as follows: April 1, 1945 plaintiff entered into an oral contract with Sugarman to build and produce as soon as possible a commercial camera known as the consolidated

greatest number of people in the world
and the most of any other country
and the most of any other country

and the most of any other country
and the most of any other country
and the most of any other country

and the most of any other country
and the most of any other country
and the most of any other country

and the most of any other country
and the most of any other country
and the most of any other country

and the most of any other country
and the most of any other country
and the most of any other country

and the most of any other country
and the most of any other country
and the most of any other country

and the most of any other country
and the most of any other country
and the most of any other country

and the most of any other country
and the most of any other country
and the most of any other country

-4-

24" precision camera with attachments; that plaintiff would set up and manage defendants' organization so that it could produce such cameras; that defendants would furnish plans and specifications; that plaintiff was to receive for such services the sum of \$25,000; that on August 1, 1945 the 24" precision camera having been built the plaintiff and Sugarman entered into another oral contract which provided that plaintiff would build and produce "as soon as possible" another commercial camera known as the consolidated 24" standard camera with attachments for which services defendants would pay plaintiff an additional \$25,000. The second amended complaint further alleges that on July 1, 1946 plaintiff entered into another oral contract with defendants to build and produce two additional commercial cameras known as consolidated 31" precision camera and consolidated 31" standard camera with attachments and that defendant would pay plaintiff for such services an additional \$25,000 for each of the foregoing models; that plaintiff performed all the terms and conditions of the three oral agreements by building and producing the four specified models of cameras; that defendants have paid plaintiff \$13,000 for his services; that he was wrongfully discharged; and that defendants owe plaintiff a balance amounting to \$87,000.

Defendants' verified answer denied making any of the oral agreements alleged in count 1. It averred that Sugarman hired plaintiff as a shop superintendent at a weekly rate of pay, and that his weekly salary had been fully paid.

Plaintiff contends that the existence of the alleged oral contracts between the parties is clearly proved by a preponderance of the evidence. The rule is well established that where there is conflicting evidence and the testimony by fair and reasonable intendment will authorize a verdict, even though it may be against the apparent weight of the evidence, a reviewing court will not set it aside. (Carney v. Sheedy, 295 Ill. 78.) In Read v. Cummings, 324 Ill. App. 607, at page 610, we said: "It requires much more for this court to set aside a verdict and judgment than is required of the trial judge. It is his duty to set aside the verdict if he is of opinion that the plaintiff has not sustained his case by a preponderance of the evidence, while the question of preponderance of the evidence does not arise at all in this court."

Plaintiff maintains that the trial court erred in refusing to allow him to introduce evidence as to what he did to perform the terms of his oral contracts with Sugarman. He argues that in a suit of this magnitude a jury would naturally wonder how plaintiff could have earned the sum he claims due him "by the mere statement that he had performed his contract." It was not disputed that during plaintiff's employment the four cameras in question were produced and that plaintiff had performed his services satisfactorily. The primary question presented was what compensation plaintiff was to receive under the terms of his oral employment contract with Sugarman. After the trial judge sustained defendants'

objections to questions propounded to plaintiff by his counsel intended to prove performance, he made an offer of proof. The offer of proof, covering two pages of the abstract, contains numerous conclusions of fact and hearsay evidence. So far as the record shows, no ruling was made on the offer of proof. Moreover, the offer of proof of performance of the oral contracts made by plaintiff related only to the production of the first camera. With respect to the other three cameras here in controversy, no questions were asked of plaintiff by his counsel concerning performance by plaintiff, nor were offers of proof made as to them. Error cannot be assigned on a ruling sustaining an objection in the absence of a proper offer of proof. (Gaddie v. Whittaker, 344 Ill. 149.) An offer of proof is fatally defective if it contains conclusions. (Romine v. City of Watseka, 341 Ill. App. 370; Harman v. Indian Grave Drainage District, 217 Ill. App. 302.) And the burden is not upon the court to separate that part which is admissible evidence from that part which is not. See Romine v. City of Watseka, 341 Ill. App. 370.

Plaintiff insists that the trial court erred in refusing to allow him to explain his former pleadings. Plaintiff's original and amended complaint were admitted in evidence without objection. These verified pleadings were framed on the theory that plaintiff and Sugarman entered into an oral agreement which provided that plaintiff was to be employed for a period of five years at an annual salary. In the second amended complaint plaintiff's ~~claimis~~ claim is based on a series of

oral agreements under the terms of which plaintiff was to receive for his services \$25,000 on each model of camera built and produced. The record shows that plaintiff was permitted to testify in great detail that he made oral contracts of employment with Sugarman as to each model of camera, thus directly contradicting the allegations of the verified original and amended complaint. In support of this position plaintiff relies on cases decided before the adoption of the present Civil Practice Act. In the recent case of Petru v. Petru, filed November 9, 1954, number 46361, this court said:

"It is urged upon us by plaintiff's attorney that complaints are drafted by lawyers; that clients do not read them (although in her verification, plaintiff says she has read the complaint) and that plaintiff is not therefore bound by these averments. Under the Practice Act, a verified complaint calls for verification of the answer by defendant, and such verifications are no longer to be taken lightly, if they ever were. Originally, where a complaint was not verified, it was recognized that a lawyer might state his understanding of the case as derived from information given him by his client, and courts did not give a complaint great weight as an impeaching document, particularly when plaintiff was illiterate or did not understand English. After many years of the new Practice Act, it must now be clear that it requires an honest statement of the case as understood at the time pleadings are drafted."

In Shealy v. Schwerin, 317 Ill. App. 375, the court said at page 5 of the abstracted opinion:

"We are mindful of the rule that as a matter of pleading an amended pleading entirely supersedes a previous pleading if said amended pleading is complete in itself and does not refer to or adopt any portion of the original pleading or prior amended pleading of the party. It does not follow, however, that a party is not bound by his sworn admissions made in prior pleadings. Not only is plaintiff limited in his recovery to the specific amounts claimed in his second amended statement of claim but he is also

9

bound by his sworn admission in his original and first amended statements of claim that defendant was indebted to him only to the extent of \$1,000 on his written promise to pay said amount. The only exception with which we are familiar to the rule that a party is bound by his sworn admissions in prior pleadings is where it appears from a subsequent pleading that such admissions were made through mistake or inadvertence."

In the present case there are no allegations in the second amended complaint indicating that the inconsistencies in the pleadings were due to mistake or inadvertence. Nor was there an offer of proof in explanation of the inconsistencies. See Gaddie v. Whittaker, 344 Ill. 149.

Finally plaintiff complains that the trial judge exhibited prejudice against the plaintiff before the jury; that defendants' counsel made prejudicial inflammatory remarks; and that his cross-examination of plaintiff was on immaterial and irrelevant matters. The record discloses that the trial judge had read this court's opinion in the former appeal and the abstract of record before commencement of the present trial. Outside the presence of the jury the trial judge stated that plaintiff "had a habit of giving long answers bringing in matters that are not germane to the question. I am going to insist so far as both parties are concerned that the answers to the questions be direct * * * I do not want any voluntary statements made on the part of anybody." In view of the plaintiff's loquaciousness, as shown by the record, we cannot say that the trial judge's precautionary remarks were without justification. Moreover, since plaintiff's counsel indicated a willingness to comply

-9-

with the request of the trial judge we do not think plaintiff is in position to complain, nor do we find that the trial judge exhibited any prejudice against the plaintiff before the jury.

During the trial defendants' counsel propounded the following question: "Now I ask you, Mr. Borrowdale, were you swearing falsely when you subscribed to this complaint [the original complaint] or were you swearing falsely yesterday and today when you testified respecting the contract?" Plaintiff's objection to this question was sustained. Plaintiff insists that the court erred in refusing to instruct the jury to disregard this question. Under the circumstances we do not regard the court's refusal to so instruct the jury as likely to prejudice the plaintiff.

Plaintiff says that the trial court allowed a member of the jury to have a conversation in open court with defendants' counsel during which he read to the jury a former pleading. It appears that a juror requested permission of the court to ask defendants' counsel the following question: "May I ask Mr. Jenner in defendants' exhibit number two you mention Mr. Borrowdale was employed at seventy-five hundred dollars a year which was to be increased depending upon production." The court stated "Would you read that particular paragraph. Is that all right with you Mr. Pabst if he re-reads the particular paragraphs that seems to bother the juror?" Plaintiff's counsel replied: "I see no harm in that," whereupon defendants' counsel then read paragraphs 2, 3 and

THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

1

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

THE HISTORY OF THE REIGN OF KING CHARLES THE FIRST

-10-

4 of the original complaint. Obviously the paragraphs of the original complaint were not clear to the juror. Inasmuch as the entire pleading was received in evidence without objection and the clarification was made with the consent of plaintiff, we do not think that any injury resulted to plaintiff.

Plaintiff says that defendants' counsel persisted in interrogating plaintiff with reference to his former employment with Foote Brothers Gear Company and his compensation at ninety-four cents an hour, for the purpose of prejudicing the jury against him. Defendants' counsel argues that the lengthy cross-examination was proper because the plaintiff in his direct examination sought to "blow up" the nature of his employment and his compensation at Foote Brothers Gear Company so as to furnish a background of prior employment consistent with his story that Sugarman employed him at \$25,000 per model rather than as a shop superintendent at a weekly salary. Plaintiff having testified in great detail about his former employment and work at Foote Brothers Gear Company on direct examination, it would seem that defendants' cross-examination was proper because it had an important bearing on plaintiff's experience and earning capacity before he was employed by Sugarman.

From a careful examination of the record consisting of more than fourteen hundred pages we are of the opinion that the remarks made by defendants' counsel alleged to be inflammatory and his cross-examination of plaintiff on alleged

• • • • •

[illegible]

1. *Phragmites* (common)

1. *Journal of the American Medical Association*, 1967; 202: 1001-1002.

• *Journal of the American Medical Association*, 1997; 277: 1009-1012

[illegible]

● 1997年12月，在《中国环境报》上，刊登了“中国环境状况令人堪忧”的文章，指出中国环境状况令人堪忧，呼吁全社会行动起来，共同保护我们的家园。

-11-

immaterial and irrelevant matters did not exceed the bounds of propriety in a vigorously contested case.

There is ample evidence to support a finding that plaintiff was employed by Sugarman as a shop superintendent at a weekly rate of pay.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND FEINBERG, J., CONCUR.

1. The first of these is the

fact that the system is

not a simple one

and that it is

very complicated

and that it is

very difficult to

(Case No. 227)

Russell L. Borrowdale, Appellant, v. Benjamin Sugarman,
Trading as Consolidated Photo Engravers Equipment Comp-
any and Consolidated Photo Engravers Equipment Company,
Appellees.

Gen. No. 46,320. (Abstract of Decision.)

CONTRACTS, § 576 * __evidence of contract for services.

In action for breach of alleged oral contracts, evidence was sufficient
to sustain finding that plaintiff was employed by defendant as a
shop superintendent ~~and~~ at a weekly rate of pay and was not to be
paid a specified total amount of money for each of four commercial
camera models produced by plaintiff for defendant, as contended by
plaintiff.

~~Error to the~~ Municipal Court of Chicago;
Appeal from the ~~Superior Court of Cook County;~~
~~Circuit Court of~~
~~County Court of~~
~~City Court of~~

~~county;~~
~~county;~~

the Hon. Samuel B. Epstein, Judge, presiding.

~~Affirmed~~ Judgment affirmed.

~~Reversed~~

~~Reversed and remanded with directions.~~

Heard in the third division, first district, this court at the April term, 1954

Kinne & Scovel,

for appellants;

~~for plaintiffs in error;~~

Furns, Jr.,

for appellees;

Albert E. Jenner, Jr., Philip W. Tone, and Kenneth J. A.

~~Johnston, Thompson, Raymond~~ Wayer, of counsel.

~~for defendants in error.~~

Opinion by ~~Presiding~~ JUSTICE Lewe.

Not to be published in full. Opinion filed December 19, 1954.

~~; rehearing~~

~~denied~~; released for publication

12 A
Gen. No. 10768

Agenda No. 28.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCT. TERM, A. D. 1954.

4 1.A. 2d 153

ANNA F. RYAN, Administrator of the)
Estate of Michael A. Ryan, Deceased,)
Plaintiff-Appellant,)

vs.)

FRANK J. BARR, Individually and as)
Executor of the Estate of Jennie A.)
Ryan, Deceased, VERONICA N. BARR,)
WILHELMI, CATHERINE A. BARR,)
WEITZ, JOHN V. BARR, ROBERT W.)
BARR, JAMES W. BARR and David)
M. BARR, Defendants-Appellees.)

) Appeal from the
) Circuit Court of
) Grundy County,
) Illinois.

WOLFE, -- P.J.

Anna F. Ryan as Administrator of the Estate of Michael Ryan, Deceased, filed a suit in the Circuit Court of Grundy County, against Frank J. Barr, individually, and as Executor of the Estate of Jennie A. Ryan, Deceased, and Jennie Ryan's nephews and nieces, to declare the will of Jennie Ryan inoperative as to Michael, and asked to have the Estate of Jennie Ryan ~~be~~ distributed to the Estate of Michael Ryan in the same manner as if Jennie Ryan had died intestate.

Jennie Ryan died leaving a last will and testament in which she devised all her estate to her husband, Michael

2.

Ryan, for and during his natural life, and at his death to go to her nephews and nieces. Michael Ryan was a mentally incompetent person and ^{David M.} ~~Frank J.~~ Barr, a nephew of Jennie Ryan, was appointed his conservator.

It is alleged in her complaint that it was the duty of ^{David M.} ~~Frank J.~~ Barr to go into Court and renounce the provisions made for Michael Ryan in Jennie Ryan's will, and elect to take one-half interest in the estate as provided by Statute, and ^{David M.} ~~Frank J.~~ Barr as such conservator, neglected and refused to do so. In the meantime, Michael Ryan died and the administrator of his estate asked the Court to renounce the provisions made for Michael under his deceased wife's will. The defendants filed a motion to strike the petition and alleged several reasons why the petition did not state a cause of action. The principal one is that the rights of the parties have been adjudicated in former litigation. They set forth copies of orders in the County and Circuit Court to sustain their contention. The record shows that on June 19, 1950, the nephews and nieces of Michael Ryan filed in the office of the County Court of Grundy County, Illinois, their petition for an order directing David M. Barr as Conservator of Michael Ryan, the incompetent, to renounce the will of Jennie A. Ryan, his deceased wife. The order of the County Court is as follows: "This cause coming on to be heard upon the verified petition of James P. McCarthy, Jetta G. Reid, Mary Alice Madden, Helen M. Sweeney, Catherine McAllister, Gertrude A. Downs,

Margaret Lucken and Thomas H. Ryan against David M. Barr, as conservator of the person and estate of Michael Ryan, incompetent, praying for an order to compel said conservator to file a renunciation on behalf of said ward of the will of Jennie A. Ryan, deceased, and the verified answer of said conservator thereto, and the verified petition of James P. McCarthy, Jetta G. Reid, Mary Alice Madden, Helen M. Sweeney, Catherine McAllister, Margaret Lucken and Thomas H. Ryan against said conservator to show cause why he should not be removed as such conservator, and the verified answer of said conservator thereto, said petitions having been consolidated for the convenience of the court and parties thereto;

"And the petitioners James P. McCarthy, Jetta G. Reid, Mary Alice Madden, Helen M. Sweeney, Catherine McAllister, Gertrude A. Downs and Margaret Lucken appearing by Patrick T. Driscoll and Albert H. Krusemark, Jr., their attorneys, petitioner Thomas H. Ryan by Wise and Wise, his attorneys, and said conservator by Arley Munts, his attorney;

"And Frank J. Barr, individually and as executor of the will of Jennie A. Ryan, deceased, Robert W. Barr, James W. Barr, John V. Barr, Veronica M. Barr Wilhelmi and Catherine A. Barr Weitz, and each of them, having been duly notified by petitioners of the presentation of said petition to compel renunciation, the presentation of said petition for removal of said conservator, and the making of said Thomas H. Ryan a party petitioner to each of said petitions;

4.

"The court, having examined the documentary evidence and heard the evidence presented at the hearing hereon and the arguments of counsel, and being fully advised in the premises, Finds that it has jurisdiction of the subject matter and parties, that it would not be for the best interests of said incompetent that said conservator be compelled on behalf of his ward to file a renunciation of the will of Jennie A. Ryan, deceased, and that the material allegations of said petition for the removal of said conservator have not been proved and cause has been shown why said conservator should not be removed.

"It is therefore Ordered, Adjudged and Decreed by the court that the prayers of both said petitions to compel a renunciation on behalf of said ward of the will of Jennie A. Ryan, deceased, and for the removal of said conservator, and of each of said petitions, be and are hereby denied, and said petitions, and each of them, are hereby dismissed."

From the order dismissing this petition, the petitioners took an appeal to the Circuit Court of Grundy County. Later on the Conservator of Michael A. Ryan made a motion to dismiss the appeal. The Court sustained the motion and dismissed the appeal. Later the appellants filed a motion to reinstate the cause in the Circuit Court. This motion was denied and no appeal was taken from either of these decisions of the Circuit Court.

The Supreme Court in the case of Sippel vs. Wolff, in 333 Ill. 284, in discussing the merits of a similar controversy we find this language: "In 1909 the conservator,

The court, having granted the defendant's motion
 and made the evidence presented in the hearing before it
 the subject of a writ, the writ being granted in the
 premises, that the writ be granted in the premises
 and that the writ be granted in the premises and that
 of said defendant that said defendant be committed to the
 jail of the said county for a period of six months
 to three years, and that the writ be granted in the
 premises for the reasons of said defendant and that
 the writ be granted in the premises and that the writ
 be granted in the premises and that the writ be granted

[illegible]

The Court stated that the Government had failed to establish that the defendant was a member of the Communist Party at the time he was arrested.

in 1933-1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2

5.

the State Bank, filed for its ward in the probate court a renunciation of the provisions of the will and elected for her to take under the statute. In 1911 the probate court, in the course of the administration of the Jauss estate, decided the conservator had no authority to make the renunciation and election and that the same were of no effect. The court refused to recognize the renunciation in the settlement and distribution of the estate. It directly affected the parties interested in the settlement. There was no appeal from the order entered as a result of the decision. It is too late now to challenge it. The court had jurisdiction of the subject matter and of the parties. However erroneous the decision and judgment may have been, all parties to the record, and those in privity with them, are now precluded from urging the error complained of. Everyone affected by it is concluded by it in this collateral proceeding. *People v. Chicago Bonding Co.* 294 Ill. 362; *People v. Kohlsaat*, 168 id. 37; *Holt v. Snodgrass*, 315 id. 548; *Sheahan v. Madigan*, 275 id. 372; *Chicago Title and Trust Co. v. Brown*, 183 id. 42; *Matthews v. Doner*, 292 id. 592."

Later on in the opinion we find further statements by the Court that are very applicable to the case that we are now considering, and it is there held: "If the rights of an insane person have been determined during her life there is no occasion to consider them after her death. Section 10 expressly provides that the rights of heirs derived through an insane person shall be subject to

determination after the death of such person only where 'no determination or judgment has been had of or upon the title, right or action which accrued' before the death of the insane person. During the life of the insane person the right now presented and claimed was denied as belonging to her and is not now a matter to be reconsidered as to those claiming through her. In other words, when the probate court, during the settlement of the estate of Jauss, held that the incompetent widow should not through her conservator renounce the will of her husband, such action, however erroneous, if it was erroneous, was a determination of the right and cannot now be asserted by her heirs. The bill avers the determination, the demurrer admits it, and by virtue of the section relied on the question is not now subject to re-examination.

"The court's action is clarified when we recall that the probate court has to a certain extent the powers of a court of chancery over insane persons and their property. The jurisdiction is exercised in the interest of the insane and of infants, properly designated as wards of the court. A court of equity will suffer no intrusion upon rights and interests of infants or of the insane. The statute authorizing the renunciation of the provisions of a will by a widow, an infant or an insane person requires only that the renunciation shall be filed. It is not required to be approved by the court. When the conservator filed a renunciation of the provisions of the will on behalf of

7.

its ward it did what it deemed proper and best for such ward. It is not disclosed by the record when the probate judge learned of the renunciation, but he was informed of it and entered an order nullifying it. Nothing in the bill discloses any impropriety in the order setting it aside."

While there are other questions raised by the pleadings in this case, it seems to us that the only one necessary for a proper decision is whether the plea of res judicata should be sustained in this case. Here the same parties were before the County Court, and the County Court had jurisdiction both of the subject matter and the parties to this litigation. The same questions were litigated in the former case that ~~is~~^{are} now before us in this appeal. The decision of the County Court was appealed to the Circuit Court, and there dismissed, and as stated in Sippel vs. Wolff, supra, however erroneous the decision and judgment may have been, all parties to the record and those in privity with them, are now precluded from urging the error complained of. It is our conclusion that the matters alleged in this complaint have been adjudicated against them in a former proceeding, and that the trial court properly dismissed the petition, and the judgment appealed from should be affirmed.

Affirmed.

27 A

46449

ELSA M. OLESEN,

Appellant,

v.

THE TRUST COMPANY OF CHICAGO, as
Trustee under Trust Agreement dated
March 23, 1945, and known as Trust
No. 4526; A. KAMENJARIN and
LAFAYETTE FISHER,

Appellees.

1 4 1.A. 2d 3, 2

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Elsa M. Olesen filed a complaint at law in the Superior Court of Cook County against The Trust Company of Chicago, as trustee under a trust agreement, hereinafter called the trustee, A. Kamenjarin and Lafayette Fisher, asked judgment for \$15,000, and a trial by jury. Subsequently she filed a two count amended complaint, the first at law and the second in chancery.

In the law count, containing 22 paragraphs, plaintiff alleged that on July 25, 1946, she contracted to purchase real estate from the trustee; that the contract was signed on behalf of the trustee by Fisher, who designated himself as "duly authorized agent in this behalf"; that the contract provided for an earnest money payment of \$25,000, of which \$15,000 was paid in cash and \$10,000 through the delivery of a note signed by her payable to the trustee; that Fisher was designated escrowee of the earnest money, with directions to pay the brokerage commission and render the surplus to the seller, unless the purchaser should be entitled to a refund;

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

-2-

that the contract was procured through false representations by Fisher and Kamenjarin (a broker), knowing the same to be false and relied upon by her; that at the time the contract was executed by Fisher on behalf of the trustee he was not a beneficiary under the trust and had no right, authority or agency to bind the trustee; that the contract was unilateral, invalid, without consideration and void; that Fisher wrongfully turned over the note to the trustee; and that the trustee did not become the legal owner or holder of the note. Plaintiff asked judgment for \$25,000. The chancery count adopted the allegations of the law count and added that contrary to his duty Fisher wrongfully delivered the note to the trustee; that judgment by confession was entered on that note in the Municipal Court of Chicago; that thereafter on motion of the trustee the judgment was vacated and the suit dismissed; and that the note should be delivered up to the plaintiff and be marked "canceled." Plaintiff asks cancellation of the note and general relief.

The trustee and Fisher, answering the law count, denied the allegations of fraud and misrepresentation; averred that Fisher was the beneficiary under the trust and authorized to bind the trustee to the contract; denied any want of consideration or invalidity of the contract; denied that the note wrongfully came to the trustee; and denied that the trustee was not the legal owner or holder of the note. The defendants, answering the chancery count, adopted their answer to the law count; again denied that Fisher had

wrongfully delivered the note to the trustee; and stated that the suit upon the note in the Municipal Court was nonsuited on motion of the trustee without any determination of the merits. In an answer Kamenjarin denied that he made any misrepresentations and denied any wrongdoing. In a counterclaim he asked judgment against plaintiff, the trustee and Fisher for \$5,000 and an additional amount for costs and expenses. Subsequent pleadings were filed by the respective parties.

Plaintiff elected to try the chancery count first and the cause was assigned to the chancery division. On motion of the plaintiff the cause was referred to a master in chancery. Oral and documentary evidence were offered by the plaintiff before the master. The court denied plaintiff's motion to withdraw the chancery count and to transfer the cause for reassignment as a law action. The court fixed a time for the closing of proofs before the master. Proofs were subsequently closed. The master found that on July 25, 1946, plaintiff, as buyer, executed a real estate purchase contract, subscribed on behalf of the trustee by Fisher as its "duly authorized agent," and that the contract provided for an earnest money payment of \$25,000, of which \$15,000 was paid in cash and the balance by a note of \$10,000 payable to the trustee. The master said that plaintiff attempted to prove that in entering into the contract she relied upon the contents of a certain operating statement which Kamenjarin and Fisher represented to be true and correct, but which was allegedly false. The master found that plaintiff failed to

100

The first part of the paper is devoted to a general
 discussion of the problem of the existence of solutions
 of the system of equations (1) and (2). It is shown
 that the system has a solution if and only if the
 matrix A is nonsingular. The second part of the
 paper is devoted to the study of the properties of
 the solutions of the system. It is shown that the
 solutions are unique and that they depend continuously
 on the data of the problem. The third part of the
 paper is devoted to the study of the stability of
 the solutions. It is shown that the solutions are
 stable with respect to the initial conditions and
 with respect to the data of the problem. The fourth
 part of the paper is devoted to the study of the
 asymptotic behavior of the solutions. It is shown
 that the solutions tend to zero as $t \rightarrow \infty$. The
 fifth part of the paper is devoted to the study of
 the periodic solutions of the system. It is shown
 that the system has a periodic solution if and only
 if the matrix A is singular. The sixth part of
 the paper is devoted to the study of the bifurcation
 of the solutions. It is shown that the system has
 a bifurcation point if and only if the matrix A
 is singular. The seventh part of the paper is
 devoted to the study of the global properties of
 the solutions. It is shown that the solutions are
 bounded and that they tend to zero as $t \rightarrow \infty$.
 The eighth part of the paper is devoted to the
 study of the numerical solution of the system. It
 is shown that the system can be solved numerically
 by the Runge-Kutta method. The ninth part of the
 paper is devoted to the study of the qualitative
 properties of the solutions. It is shown that the
 solutions are unique and that they depend
 continuously on the data of the problem. The
 tenth part of the paper is devoted to the study
 of the stability of the solutions. It is shown that
 the solutions are stable with respect to the initial
 conditions and with respect to the data of the
 problem. The eleventh part of the paper is devoted
 to the study of the asymptotic behavior of the
 solutions. It is shown that the solutions tend to
 zero as $t \rightarrow \infty$. The twelfth part of the
 paper is devoted to the study of the periodic
 solutions of the system. It is shown that the
 system has a periodic solution if and only if the
 matrix A is singular. The thirteenth part of
 the paper is devoted to the study of the bifurcation
 of the solutions. It is shown that the system has
 a bifurcation point if and only if the matrix A
 is singular. The fourteenth part of the paper is
 devoted to the study of the global properties of
 the solutions. It is shown that the solutions are
 bounded and that they tend to zero as $t \rightarrow \infty$.
 The fifteenth part of the paper is devoted to the
 study of the numerical solution of the system. It
 is shown that the system can be solved numerically
 by the Runge-Kutta method. The sixteenth part of
 the paper is devoted to the study of the qualitative
 properties of the solutions. It is shown that the
 solutions are unique and that they depend
 continuously on the data of the problem. The
 seventeenth part of the paper is devoted to the
 study of the stability of the solutions. It is shown
 that the solutions are stable with respect to the
 initial conditions and with respect to the data of
 the problem. The eighteenth part of the paper is
 devoted to the study of the asymptotic behavior of
 the solutions. It is shown that the solutions tend
 to zero as $t \rightarrow \infty$. The nineteenth part of
 the paper is devoted to the study of the periodic
 solutions of the system. It is shown that the
 system has a periodic solution if and only if the
 matrix A is singular. The twentieth part of the
 paper is devoted to the study of the bifurcation
 of the solutions. It is shown that the system has
 a bifurcation point if and only if the matrix A
 is singular.

-4-

establish her contentions by a preponderance of the evidence and that she failed to establish any ground for relief under Count II (the chancery count) of her amended complaint. The master also recommended that the motions of defendants for judgment in their favor under Section 64(4) of the Civil Practice Act be granted.

In a supplemental report the master recommended that Count II of the amended complaint be dismissed for want of equity. The report and supplemental report of the master came on for hearing before the chancellor. No exceptions were filed by the plaintiff. On May 27, 1953, the court entered a decree approving the report and the supplemental report of the master, denying the prayer of Count II of the amended complaint and dismissing that count for want of equity. No appeal has been prosecuted by the plaintiff from the decree of May 27, 1953, dismissing the chancery count for want of equity.

On October 7, 1953, the trustee and Fisher filed an amendment to their answer to Count I of the amended complaint (the law count) and as a separate, additional defense pleaded that the determination effected by the decree of May 27, 1953, of Count II adverse to plaintiff, was a bar to any relief by plaintiff under Count I. Plaintiff's reply alleged that her motion to dismiss Count II was made as a matter of right and she renews the motion; that the hearings before the master and his report and the order made thereon should be stricken; and that there was no adjudication of

her charges of fraud and misrepresentation for the reason that she withdrew her Count II to prevent the master from jeopardizing her right to a jury trial. She denies that the order of May 27, 1953, proscribed her rights to a jury trial or that the jury is proscribed in their determination of the facts by the report of the master or the order of the court. She denies that the determination by the master and the order of the court bars her right to relief under Count I of the amended complaint, and asserts that having a "foreknowledge or fear of an attempt to thwart" her right to trial by jury she moved to withdraw Count II so as to protect herself against any intention to deny her right to trial by jury. At the time defendants filed their amendment to their answer to Count I the trustee filed a counterclaim upon the note for \$10,000, alleging that on July 25, 1946, plaintiff executed and tendered her note to the counterclaimant for \$10,000 due October 1, 1946, with interest at six percent per annum until paid; that the note and interest are unpaid; that counterclaimant had theretofore procured judgment by confession to be entered in the Municipal Court of Chicago upon the note; that the judgment by confession was vacated; that counterclaimant, as plaintiff therein, voluntarily dismissed the suit; that such dismissal was without prejudice by voluntary nonsuit; that the promissory note is the same note referred to in the amended complaint of plaintiff; that plaintiff by Count II of her amended complaint sought a determination of nonliability on her part under the note and to have the note

ordered surrendered and marked canceled; and that the determination and adjudication effected by the court in its decree of May 27, 1953, established that plaintiff was without right to have the note ordered surrendered up or canceled. Counterclaimant asked judgment against plaintiff for the amount of the note and interest. Plaintiff, answering the counterclaimant, admitted that she signed the note but says it was done under duress in that counterclaimant defrauded her out of the note and the further sum of \$15,000 in cash as averred in her amended complaint. She admits no part of the note was paid and says that the note was obtained from her by fraud, misrepresentation and without consideration. Counterclaimant's reply denied the charges of duress, fraud, misrepresentation and want of consideration and averred that the matters of defense had been adjudicated adversely to plaintiff by the decree of May 27, 1953, and that the decree barred the defenses.

When Count I of the amended complaint and the counterclaim came on for trial the trustee moved for judgment upon its counterclaim and the defendants for judgment against the plaintiff upon the record and the pleadings. The motions were allowed and on November 2, 1953, judgment was entered against the plaintiff on Count I of the amended complaint and in favor of the trustee upon the counterclaim. It was further ordered that hearing upon the counterclaim of Kamenjarin be postponed. On November 12, 1953, plaintiff filed a petition asking that the master's report and the order

-7-

confirming it and the judgment theretofore entered in favor of the defendants and the denial by the court of plaintiff's right to trial by jury "be vacated and set aside and the cause be set down for trial by jury." The court denied the prayer of the petition. Plaintiff appealed to the Supreme Court from the judgment of November 2, 1953, and from the order of November 12, 1953, denying the prayer of plaintiff's petition in which she, among other matters, sought to vacate the decree of May 27, 1953, and that court transferred the case.

We cannot agree with plaintiff's contention that she has been deprived of a right to a trial by jury. The function of a jury is to decide issues of fact. Where no issues of fact arise there can be no denial of the constitutional right to a trial by jury. The issues of fact upon the law count in plaintiff's amended complaint were the same as those upon the count in chancery. The issues of fact in the chancery count were determined adversely to plaintiff by the decree of May 27, 1953, dismissing that count for want of equity. Through her amended complaint she sought a determination that her contract to purchase real estate from the trustee was not binding upon her and that she was entitled to the return of her earnest money payment. Since the earnest money consisted of \$15,000 paid in cash and a promissory note for \$10,000 she filed her amended complaint in two counts, Count I at law for a money judgment and Count II in chancery for cancellation of the note. The issues of fact under both

counts, as to the validity of the contract, are identical. That which was true with respect to plaintiff's law count was true with respect to defendant's counterclaim, when the matter came on for trial. Plaintiff had pleaded no effective avoidance of the adjudication by the decree of May 27, 1953. After the court had determined the real estate contract to be valid, by the decree of May 27, 1953 upon the count in chancery, and had denied cancellation of the \$10,000 note given as part of the earnest money, it could not, while the decree remained in effect, conclude in the trial of the law count that the contract was invalid and enter judgment for repayment of the \$15,000 cash portion of the earnest money, or deny recovery upon the note in the action under the counterclaim. Plaintiff is not in a position to attack the decree of May 27, 1953. The trial court lacked jurisdiction to vacate the decree of May 27, 1953, under the petition filed by plaintiff on November 12, 1953, more than thirty days after the entry of the decree. See Sec. 50(7) of the Civil Practice Act.

The action in chancery sought the relief of cancellation based upon allegations of fraud, misrepresentation and other grounds. Fraud is a recognized subject of equity jurisdiction. The remedy of cancellation is equitable. The count in chancery stated a case which the chancellor was authorized to hear and decide and the decree of the court is not subject to collateral attack. Plaintiff procured the reference of the cause to a master under an order directing the master to take and report the testimony and his conclusions

100

... and to ...
...
...
...
...
...
...
...
...
...
...
...

101

102

103

104

105

106

107

108

109

110

111

112

113

114

of law and fact. After approximately 100 pages of plaintiff's proofs were taken and various exhibits offered by her, she chose to terminate her proofs and no further evidence was offered in the case.

Section 52 of the Civil Practice Act provides that a voluntary dismissal without prejudice may be granted after a trial or hearing begins only upon filing a stipulation to that effect signed by the defendant, or on the order of the court made on special motion in which the ground for such dismissal shall be set forth and which shall be supported by affidavit. The hearing was in progress at the time plaintiff's motion for a voluntary dismissal was presented. We are of the opinion that the chancellor did not abuse his discretion in refusing to dismiss the count in chancery. The decree of May 27, 1953, dismissing the count in chancery, established a binding rule of decision applicable to the law count of the amended complaint and of the counterclaim of the trustee.

For the reasons stated the judgment and orders entered by the Superior Court of Cook County on November 2, 1953, and November 12, 1953, are affirmed.

ORDERS AFFIRMED.

FRIEND, J., and
NIEMEYER, J., CONCUR.

2-

A

46452

CHARLES J. MONAHAN,
Plaintiff-Appellee,
v.
BRUNEAU E. HEIRICH,
Defendant-Appellant.

4 I.A.^{2d} 373
APPEAL FROM
CIRCUIT COURT
COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF
THE COURT.

Charles J. Monahan filed an action for an accounting against Bruneau E. Heirich. They are attorneys at law. The defendant filed a counterclaim. The chancellor entered a decree sustaining the report of a master in chancery, and defendant appeals from a provision of the decree awarding one half of the fee in the Panoch case to plaintiff.

The parties practiced their profession in Chicago. They first met approximately 25 years ago when plaintiff was on the faculty and defendant was a student at a law school. They became associated in the practice of law in February, 1946, and that relationship continued until December, 1949. The parties agreed that if the defendant became associated with the plaintiff in any personal injury cases or other matters which were the "business" of the plaintiff the fees would be divided equally. In August, 1948, Edward J. Panoch, a freight handler employed by a railroad, who had been injured in the line of duty, was a patient in St. Luke's Hospital, Chicago. In response to a call

-2-

from a relative of the patient plaintiff went to the hospital where he met the relative. They could not see the patient because it was after visiting hours. Plaintiff and the relative left the hospital and walked to the relative's automobile where plaintiff was introduced to the wife of the injured man. The case was discussed. Plaintiff said that he could not come to the hospital the next day to see the patient because he was leaving town on a vacation but that he would call the defendant and request him to meet Mrs. Panoch at the hospital. Plaintiff called defendant on the telephone, told him about being at the hospital and his inability to see the patient, gave defendant Mrs. Panoch's telephone number and told him that if he went to the hospital the patient would sign a contract employing defendant to represent him. The master found that the plaintiff told defendant in this conversation that if he went to the hospital Panoch would sign a contract employing both the plaintiff and the defendant.

The following day defendant went to the hospital pursuant to an appointment made with Mrs. Panoch and discussed the case with the injured man and his wife. Panoch then told defendant that he thought he would require the services of an attorney but that "they" were undecided as "they" expected the railroad claim agent back in a day or so and that Mrs. Panoch would let defendant know. Later Mrs. Panoch called the defendant to have him come to the hospital to see her husband, which he did. At this meeting Panoch signed a contract retaining defendant to prosecute his claim. The contract did not include

-3-

plaintiff and was signed on September 7, 1948, the date it bore. The interval between the first and second meetings of defendant and the Panochs was approximately eight days. Subsequently a suit was filed by defendant in behalf of Panoch against the railroad. In order to prepare the suit for trial the defendant made a complete investigation of the facts, held numerous conferences with the attorneys for the railroad and with various doctors, attended pretrial conferences, answered ready for trial on three or four occasions and on the day the case was reached for trial had his client in court and the witnesses available to testify. The case was thoroughly prepared for trial. After the jury was called a conference culminated in a \$45,000 settlement. Plaintiff testified that some months after the Panoch case was filed he first learned he was not named as an attorney in the litigation and that this occurred when he checked the files in the clerk's office. Plaintiff said he then asked the defendant if his name was in the contract and that defendant said it was not and that he had forgotten about it or something like that. Defendant testified that plaintiff "never" asked to be included in the contract or suit but that after plaintiff filed his lien claim he asked to be cut in on the fee. When the case was about to be reached for trial the plaintiff served an attorney's lien on the railroad. At the time the personal injury case was settled the attorneys' fees were deducted from the settlement, one half thereof being deposited with the clerk pending the

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe, or whether it is a mere accident.

In the second part of the paper, the author discusses the various theories of the origin of life. He begins with the theory of spontaneous generation, which was the dominant theory of the origin of life until the middle of the nineteenth century. He then discusses the theory of biogenesis, which was proposed by Louis Pasteur in 1859. Finally, he discusses the theory of abiogenesis, which was proposed by Oparin and Haldane in 1924.

The author concludes that the theory of abiogenesis is the most plausible theory of the origin of life. He argues that the theory of spontaneous generation is based on a false premise, namely, that life can arise from non-life. He also argues that the theory of biogenesis is based on a false premise, namely, that life can only arise from life. Finally, he argues that the theory of abiogenesis is based on a true premise, namely, that life can arise from non-life.

In the third part of the paper, the author discusses the various experiments that have been conducted to test the theory of abiogenesis. He begins with the experiment of Miller and Urey in 1952, which showed that organic molecules can be synthesized from inorganic molecules. He then discusses the experiment of Fox in 1958, which showed that amino acids can be synthesized from inorganic molecules. Finally, he discusses the experiment of Orgel in 1961, which showed that nucleic acids can be synthesized from inorganic molecules.

The author concludes that the experiments of Miller and Urey, Fox, and Orgel provide strong evidence in favor of the theory of abiogenesis. He argues that these experiments show that organic molecules can be synthesized from inorganic molecules, and that amino acids and nucleic acids can be synthesized from inorganic molecules. This suggests that life can arise from non-life.

In the fourth part of the paper, the author discusses the various implications of the theory of abiogenesis. He begins with the implication that life is a necessary part of the universe. He argues that if life can arise from non-life, then it is a necessary part of the universe. He then discusses the implication that life is a mere accident. He argues that if life can arise from non-life, then it is a mere accident. Finally, he discusses the implication that life is a product of divine creation. He argues that if life can arise from non-life, then it is a product of divine creation.

The author concludes that the theory of abiogenesis has important implications for our understanding of the origin of life. He argues that the theory of abiogenesis shows that life can arise from non-life, and that life is a necessary part of the universe. This suggests that life is not a mere accident, but a product of divine creation.

adjudication of the right thereto.

The master found that the employment of defendant by Panoch came solely because of plaintiff, that it was "business" secured by plaintiff, that the parties had agreed that if defendant became associated with plaintiff in any personal injury cases which were the "business" of plaintiff the fees would be divided equally and that therefore plaintiff is entitled to the sum of \$6,723.49 from the Panoch fee. Defendant points out that since plaintiff's total credits found by the master amounted to \$8,844.89, the deduction therefrom of \$6,723.49 representing one half of the Panoch fee would result in plaintiff's credits being reduced to \$2,121.40 as against \$3,465.00 owing by plaintiff to defendant for rental, and that the deduction of plaintiff's claim to the Panoch fee would result in a balance in favor of defendant of \$1,343.60.

Defendant maintains that the master's findings of fact and conclusions that the Panoch case was "law business" belonging to plaintiff are against the manifest weight of the evidence and erroneous. We are of the opinion that the master's findings of fact as to the Panoch case, approved by the chancellor are not contrary to the manifest weight of the evidence. Plaintiff was brought into the case by a telephone call from a relative of the injured man. Defendant came into the case as the result of a telephone call from the plaintiff. The case was one in which the parties were associated and under their agreement the fees were to be divided equally.

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

Defendant also argues that plaintiff is precluded from recovery because Canon 34 of the Canons of Professional Ethics of the American, Illinois State and Chicago Bar Associations provides that no division of fees for legal services is proper, except with another lawyer based upon a division of service or responsibility. The agreement between the parties envisioned a division of service or responsibility in the Panoch case. In other cases in which the parties were associated there was a division of service or responsibility and that understanding would apply to the Panoch case. We do not think that the arrangement in the Panoch case violated the canon.

For the reasons stated the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

BURKE, P. J., AND NIEMEYER, J., CONCUR.

1871

1871

1871
1871
1871
1871

1871
1871

1871

1871

1871

1871

1871

1871

1871

1871

46500

VICTOR PINE and SAMUEL PINE,
doing business as PINE ROOFING
CO.,

Appellees,

v.

R. L. WHEELER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF
THE COURT.

A judgment by confession was entered in favor of Victor Pine and Samuel Pine, doing business as Pine Roofing Co., and against R. L. Wheeler for \$1351.25. The action was based on a note signed by the defendant and reciting that thirty days after date, for value received, he promised to pay to the order of "Pine Roofing Co." \$1386 with interest. The note contained the usual warrant of attorney authorizing a confession. In a verified petition to vacate the judgment the defendant stated that it "was based upon a note payable to Pine Roofing Co. which said Pine Roofing Co. is a fictitious name, that it is not a legal entity; that it is not a corporation; that said Victor Pine and Samuel Pine are not registered with the Clerk of the County Court as doing business under the said fictitious name of Pine Roofing Co. as provided by law" and that "nothing appears as to how and why said Victor Pine and Samuel Pine became entitled to confess judgment on said note; whether by

-2-

assignment or in what manner they obtained title to said note and by whom transferred in accordance with the statute" and that the "judgment is void and of no effect." The defendant appeals from an order denying his petition to vacate the judgment.

Plaintiff concedes the first point urged by defendant that a judgment by confession entered without jurisdiction appearing on the face of the record should be vacated. The court had jurisdiction of the subject matter and obtained jurisdiction of the defendant by virtue of the appearance and cognovit filed in his behalf pursuant to the warrant of attorney. It will be noted that the defendant does not claim any defense on the merits.

Defendant asserts that "the instrument upon which the judgment was founded was a nullity, inasmuch as it lacked an essential element of a contract, that is, parties thereto," and points out that "Pine Roofing Co." is not the name of either a natural person or a corporation. In Renfrow v. Anthony, 253 Ill. App. 123, the court said (127):

"The fact that a person in the transaction of his business takes a note wherein the payee appears under the style and name by which he conducts his business does not have the effect of making such payee fictitious. The rule as stated in 8 C.J. 172, is as follows: 'The real payee may be described by his business name, or by an assumed name such as that of a fictitious corporation.' To the same effect are the following: Bonner v. Gordon, 63 Ill. 443; People v. Rose, 219 Ill. 46; Graham v. Eiszner, 28 Ill. App. 269; First Nat. Bank of Litchfield v. Cox, 140 Ill. App. 98."

In the instant case there is a maker and payees, the latter being the plaintiffs who are described in the note

-3-

by the name by which they conduct business. The petition shows that the plaintiffs are doing business under the name of "Pine Roofing Co." and that is the name identifying them.

We do not agree with defendant's contention that the statement of claim is defective because of failure to comply with Rule 18 of the Municipal Court that the assignee and owner of a nonnegotiable chose in action may sue thereon in his own name, and in his pleadings on oath allege that he is the actual bona fide owner thereof and set forth how and when he acquired title. The statement of claim does not attempt to allege an assignment. It avers that the note is payable to the plaintiffs using their trade name.

The court was right in overruling defendant's petition to vacate the judgment and it is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., AND NIEMEYER, J., CONCUR.

Figure 9. The effect of the initial concentration of the monomer on the polymerization of *l*-lysine.

Journal of Management Studies, 19(1), 67-80.

POLYMER LETTERS

178 9401-9406 9407-9412

1977 - 1978 - 1979 - 1980 - 1981

[illegible]

1. *Phragmites australis* (Cav.) Trin. ex Steud.

100

46424

WILLIAM LOVELL and PHYLLIS LOVELL,

Appellees,

v.

JULIA NELSON BANKS, et al.,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed a complaint in equity to forfeit the rights of defendant Julia Nelson Banks in articles of agreement for warranty deed, by which they agreed to sell her the real estate which she occupied as her homestead. A default decree was entered against defendant, but within the term she employed counsel and moved to vacate the decree. The court entered an order overruling her motion.

The complaint was filed May 28, 1953; summons was served on defendant requiring her to appear on or before July 6, 1953. On June 3, 1953 plaintiffs served defendant with notice that on that day they would move for the issuance of a writ of assistance in accordance with the verified complaint. Defendant appeared in court with her attorney, and an order was entered continuing the motion to June 15, 1953. On that day the motion was again continued to July 8, 1953, when an order was entered directing that a writ of assistance issue. Defendant appeared at these several hearings, during the course of which her attorneys conferred with plaintiffs and their counsel in an attempt to settle the controversy. On July 16, 1953, pursuant to notice served on

-2-

one of defendant's creditors, plaintiffs appeared before the trial judge and procured an order defaulting defendant, and on the same day a default decree was entered forfeiting all her rights to the real estate involved. Thereafter, on July 23, 1953, defendant's counsel filed a motion and petition to vacate the order of July 8, 1953 directing the issuance of a writ of assistance, and an order was entered on that day continuing the matter to July 28, 1953. On July 27, 1953, the creditor, who had been served with notice by plaintiffs of their motion for a default order and the default decree, moved that the decree of July 16, 1953, be vacated. Notice of this motion was served only on plaintiffs. On the same day, and without notice to defendants, another decree was entered forfeiting and canceling the articles of agreement for warranty and declaring them null and void.

On the day following the entry of the latter decree, defendant's motion to vacate the order issuing the writ of assistance came on for hearing and was continued until July 30, 1953, and subsequently further continued to August 6, 1953. Thereafter, on August 13, 1953, defendant's counsel moved to withdraw as her attorney, and an order was entered allowing him to do so. August 14, 1953 the present counsel were granted leave to file their appearance and given ten days to present a motion to vacate the decree of July 27, 1953; the August fourteenth order provided, inter alia, that defendant secure plaintiffs in their rights by depositing with them the sum of \$175.00 each month.

Within the period allowed by the court, defendant filed her motion to vacate the decree of July 27, 1953, supported by affidavit, wherein she alleged that she had appeared in the trial court on June 3, 1953 after being served with notice by plaintiffs, and that during the time plaintiffs were successful in having decrees entered against her without notice they were discussing with her attorneys the settlement of her controversy with her, and that they represented that suit would be dismissed upon settlement of the controversy. The petition further alleged that the trial court entered the default order of July 16, 1953 without notice to her, even though she had appeared in court in response to numerous motions of the plaintiffs, and that plaintiffs were fully aware of this fact; that she had filed a pleading seeking relief against processes issued by the trial court, and that the matter was pending at the time a decree was entered against her without notice; that as a defense to the complaint in the cause she would file a pleading showing that she was not indebted to plaintiffs because they had no interest in the property she was purchasing, alleging in some detail that about May 1, 1950 she had retained an attorney, naming him, who, "in order to profit out of the fiduciary relationship of attorney and client, . . . purchased the obligations of said defendant, JULIA NELSON BANKS, and now, through said nominal plaintiffs, WILLIAM LOVELL and PHYLLIS LOVELL, his wife, is attempting to use this court as a means of acquiring the real estate concerning which the

Within the period allowed by the court, called for

filed her motion to vacate the decree of July 27, 1935,

supported by affidavits, wherein she alleged that she had

appeared in the trial court on June 2, 1935 after being

served with notice by plaintiff, and that during the trial

plaintiff's wife was absent and in having deposed entered against

her without notice they were discussing with her attorney

the settlement of her controversy with her, and that they

represented that suit would be dismissed upon settlement of

the controversy. The plaintiff further alleged that she had

court entered the judgment of July 27, 1935 without

notice to her, even though she had appeared in court in

response to previous notices of the plaintiff, and that

plaintiff's wife had been at the trial; that she had

been during the trial, and that she had been present at the

trial court, and that the matter was pending at the time

she was not entered against her without notice; that she

objected to the decree of July 27, 1935 and she would file a motion

to vacate the same, and that she had been present at the trial

and that she had been present at the trial court, and that

she had been present at the trial court, and that she had

been present at the trial court, and that she had been

present at the trial court, and that she had been present

at the trial court, and that she had been present at the

trial court, and that she had been present at the trial

court, and that she had been present at the trial court,

and that she had been present at the trial court, and that

defendant, JULIA NELSON BANKS, employed . . . [him] to represent her." She further alleged that all the necessary parties were not before the court, and that her former attorney should, by order of the court, be made a party to the proceeding. Defendant's motion, to which plaintiffs had filed no reply, was heard by the court on December 9, 1953, and, pursuant to argument of counsel, the court ordered that her motion to set aside and vacate the decree theretofore entered on July 27, 1953 be overruled and denied. She appeals from that order.

Plaintiffs take the position that since defendant had been duly served with process to a given return day but failed to appear by filing a motion or pleading, she was in default, and therefore not entitled thereafter to any notice of further proceedings, and in support of this contention rely on Rule 16 of the Superior Court of Cook County, Section 20 of the Civil Practice Act (Ill. Rev. Stat. 1953, ch. 110), and several Illinois Appellate Court decisions. However, we consider as controlling People ex rel. Chicago Bar Association v. Brillow, 309 Ill. 173. In that case the attorney for defendants in an equity proceeding, with actual knowledge that the complainants were represented by an attorney who had appeared in court and had orally made and argued a motion before the trial court, without notice to the attorney, procured an order to have the master's report submitted on the defendant's evidence alone. Upon being charged with fraud and misconduct in procuring the decree, the attorney relied

upon failure of counsel for complainants to enter his formal appearance as a matter of record. Commenting on those facts, the Supreme Court said: "The only basis he has for making the claim is that Friedman did not have his name formally entered by the court of record as an attorney for complainants. He did file written pleadings in the case, and this constituted a general appearance. He made and argued a motion before the court, which was resisted by respondent, and that was a good entry of appearance." Later, in Walter v. Bowman Dairy Co., 318 Ill. App. 305, this court stated that "an appearance may be entered by making a motion, by filing an answer and in other ways," and held the doctrine enunciated in Supreme Hives Ladies of Maccabees v. Harrington, 227 Ill. 511, applicable.

In her motion to vacate the default decree, defendant alleged, as heretofore stated, that, being afforded an opportunity, she would file pleadings and adduce proof that she was not indebted to plaintiffs. Plaintiffs did not respond to defendant's motion to vacate; no counter-affidavits were filed, no plea or counter-motion was made. Moreover, the entry of the decree of July 27, 1953, without notice to defendant, denied her an opportunity to interpose a defense. The result of the denial of defendant's motion was to overrule what appeared to be meritorious defenses, if supported by competent evidence, and although a motion to vacate a default decree is ordinarily addressed to the sound discretion of the court, we think it was an abuse of discretion to

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

1677

dispose of the matter summarily in this way. In Hogan v. Ermovick, 335 Ill. 181, plaintiff filed a suit in assumpsit for legal fees. Defendant, upon the unexpected withdrawal of his counsel, immediately employed other counsel, who appeared in court the morning judgment was being entered by default. Motion to vacate the decree was denied. The Supreme Court reversed the affirmance by the Appellate Court, saying that where a meritorious defense was asserted on the same day judgment by default was entered, it would be a travesty on justice not to vacate the default judgment. In the case at bar defendant's motion was made in apt time. See also City of Moline v. C., B. & Q. R. R. Co., 262 Ill. 52, wherein attorneys for defendant filed a motion to vacate a judgment within three days after the entry thereof. The motion was denied. The Supreme Court reversed the trial court, holding it was error not to grant the motion. See also 174 A.L.R. 10, where an analysis is made of conditions under which relief under default judgments will be given by courts.

For the reasons indicated, the order entered December 9, 1953 denying defendant's motion to vacate the default decree is reversed, and the cause remanded with directions that the court allow the motion and grant defendant leave to answer, and thereafter proceed with a trial of the cause upon its merits.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J. AND NIEMEYER, J. CONCUR.

28 A

4 I.A. 2d 375

46482

PEOPLE OF THE STATE OF ILLINOIS,)
Appellant,)
v.)
EDWARD MORRIS,)
Appellee.)

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This cause was here consolidated with case No. 46481, in which an opinion is concurrently filed. Both cases involve the same questions. What we said in case No. 46481 is likewise applicable to this appeal. Therefore, the judgment of the Municipal Court is modified; that part directing the dismissal of the suit is affirmed, while the provision assessing the costs against the People is reversed; and as thus modified, the judgment of the Municipal Court is affirmed.

AFFIRMED IN PART;
REVERSED IN PART;
AND MODIFIED.

BURKE, P. J., AND NIEMEYER, J., CONCUR.

29 A

46514

4 1.A.^{2d} 376

PRAGA PRESS, Inc., a corporation,
Appellee,

v.

EVERETT J. HILL, d/b/a
HILL PUBLISHING CO.,
Appellant.

)
) APPEAL FROM MUNICIPAL
) COURT OF CHICAGO.
)
)
)
)
)

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment in the sum of \$4121.14 entered in the Municipal Court pursuant to a jury verdict in that amount.

Plaintiff operates a small printing establishment in Chicago. The statement of claim alleges that from April 1, 1949 to December 31, 1951 plaintiff sold and delivered to defendant "certain goods, wares and merchandise and rendered services to the Defendant" at his special instance and request, upon which payments were made on account to plaintiff as specifically set forth in the statement of account, and that there remained due plaintiff the sum of \$4221.08. The defense interposed is a denial of all the allegations of the statement of claim.

Blanche Born, plaintiff's witness, testified that she had worked for the Praga Press for eight years and had been general manager since February 1948; that April 1, 1949 Hill, the defendant, came to her office with one James Gentry, a customer, who introduced him; that Hill told the witness he owned and published a newspaper called The Crusader and desired to make different printing arrangements; that he had been dealing with the Berwyn Printing Company which

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSIONERS OF THE
UNIVERSITY OF CHICAGO

FOR THE YEAR
1900-1901

CHICAGO, ILL.
1901

PRINTED BY THE
UNIVERSITY OF CHICAGO PRESS

CHICAGO, ILL.

1901

CHICAGO, ILL.

CHICAGO, ILL.

CHICAGO, ILL.

-2-

was not set up to do "an eight-page job" at that time; that after discussion the parties agreed to a price of \$225.00 for 10,000 eight-page papers; that Hill gave plaintiff his check for \$225.00, and the first eight-page paper was delivered a few days later; that thereafter eight-page issues of the paper were regularly printed and delivered to The Crusader at 721 East 45th Street, where Hill operated a store and where he ordered the deliveries made; that all payments made on account were received from Hill by check and cash, and all transactions with respect to printing, delivery, receipt of money, bad checks and past-due bills were had with Hill; that credit was extended only to him; and that on several occasions he told Mrs. Born to hold checks for a few days before depositing them.

Hill's version of the relationship was that The Crusader was financed by the Negro Labor Relations League, Inc., a corporation organized not for profit; that the arrangements for the printing were made by Joseph Jefferson, Earl Sardon and Ernest Bush, members of the league, at a time when Hill was not present; and that he had no part in the transaction until after the contract for printing had been entered into. This is all at variance with Mrs. Born's testimony. She stated that the Negro Labor Relations League did not appear as publisher of The Crusader; that the initial payment was made by Hill; that the deliveries were made to the address designated by Hill;

-3-

that she visited him at his store at 721 East 45th Street on several occasions to collect money and to discuss the account; that he never disavowed responsibility for the indebtedness and never claimed that anyone else was responsible.

Upon trial defendant admitted that plaintiff delivered the papers as ordered; consequently the only issue of fact presented to the jury was whether or not defendant contracted therefor. The jury found that he did. Defendant argues that the "burden of proving its case by a preponderance or greater weight of the evidence is upon plaintiff," and that "the preponderance of the evidence does not balance in favor of plaintiff; on the contrary it preponderates in favor of defendant." The rule is clear that a reviewing court will not set aside a jury verdict on controverted questions of fact unless the verdict is against the manifest weight of the evidence. It is the function of the jury to pass upon the credibility of witnesses, their interest or lack of interest (Cochran v. Koller, 310 Ill. App. 91), and to weigh the evidence (Jacklich v. Starks, 338 Ill. App. 433).

Defendant now, for the first time, urges the Statute of Frauds and Perjuries in defense of his claim. This defense was not pleaded nor invoked upon the trial. Moreover, the defense is without merit since the evidence clearly shows that the contract was performed by plaintiff. Mead v. Chicago & Northwestern Ry. Co., 189 Ill. App. 323; Warszawa v. White Eagle Brewing Co., 299 Ill. App. 509.

The case was fairly tried; the controverted issues

-4-

of fact were resolved against defendant by the jury, and we think the court properly entered judgment upon the verdict. It is therefore affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J., AND NIEMEYER, J., CONCUR.

... ..
... ..
... ..
... ..

...

...

30 A

46437

IN RE ESTATE OF MICHAEL F. LANE,
Deceased.

DANIEL M. LANE and WILLIAM J.
LANE,

Appellants,

v.

MARIE GIBBS, individually and as
administrator of said estate,
Appellee.

4 I.A.^{2d} 376

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Petitioners Daniel M. Lane and William J. Lane, brothers of Michael F. Lane, deceased (hereinafter called plaintiffs) appeal from an order entered in the Circuit court of Cook county on appeal from the Probate court of that county striking and dismissing their petition to vacate the order of the Probate court approving the final account of the administratrix of the estate of Michael F. Lane, deceased, and discharging her.

Marie Gibbs, defendant, was appointed administratrix of the estate on petition of her husband, a nephew and heir of deceased. The heirs of deceased are petitioners, each of whom was entitled to a one-fourth interest in the estate; Elizabeth A. Lane, otherwise known as Elizabeth Lane Mellon, an incompetent, a one-fourth interest; and George A. Gibbs, husband of defendant, and Ruth Gibbs, each having a one-eighth interest.

In so far as it is material on this appeal, the estate consisted of real estate located at 374-376 N. Cicero Avenue, Chicago, 32 shares of the capital stock

22

1. *Phragmites australis* (Cav.) Trin. ex Steud.

[illegible]

123. 124. 125.

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

-2-

of The Acme-Lane Company, Inc., being all of the stock of said corporation, and 95 shares of 100 shares of the capital stock of The Lane-Stewart Company, and a 1948 Buick automobile. The real estate was sold, pursuant to a decree in a partition suit in the Superior court of Cook county, to Donna Pavlec, daughter of defendant, for \$20,050.00, and ^{the} net proceeds, \$19,162.91, paid to defendant as administratrix. The 32 shares of the capital stock of The Acme-Lane Company, Inc., were sold pursuant to order of court to defendant's daughter, D. M. (or Donna) Pavlec for \$10,000. The 95 shares of stock of The Lane-Stewart Company were sold pursuant to order of court for \$52,250.00, of which \$33,750 was paid in cash and the balance of \$18,500 evidenced by the collateral note of Joseph H. Boehmer dated February 3, 1953. The automobile was sold for \$550, the appraised value, pursuant to order of court. On March 12, 1953 the final account and report of defendant was approved and defendant discharged as administratrix. Receipts in full of their respective shares signed by three of the heirs and the guardian of the incompetent were presented with the report. There was no receipt from petitioner Daniel M. Lane, although a check dated February 13, 1953 for \$10,719.49 payable to his order and endorsed by him was attached to the report. On March 18, 1953 leave was given plaintiffs to file their motion and petition for the vacation of the order of March 12, 1953 approving the final account and discharging defendant as

administratrix. The motion, which was not verified, alleged that defendant failed and neglected to notify plaintiffs and certain other heirs of deceased of her intention to file the account or of the time and place of the hearing thereon, as provided in section 290 of the Probate Act (Ill. Rev. Stat. 1953, chap. 3, sec. 444); that defendant did not produce a receipt in full from Daniel M. Lane, plaintiff, and that the receipt signed by William J. Lane, plaintiff, was demanded as a condition precedent to the payment of the sum stated therein to which he was lawfully entitled, and was not freely or willingly given; that neither of the plaintiffs entered his appearance or waived notice of the hearing on the final account.

The petition, in addition to the facts hereinbefore stated, alleged (a) that the purchase price of the real estate sold pursuant to the decree in the partition suit was paid as follows: \$5,000 by and through the issuance of a check for that sum signed by defendant as administratrix, and the remaining \$15,000 obtained by a first mortgage loan on the real estate; that on August 18, 1952 the purchaser and her husband conveyed the real estate to the Chicago Title and Trust Company as trustee under the terms of a trust agreement dated July 16, 1952 for the benefit of an undisclosed beneficiary, which plaintiffs believe to be the defendant; (b) on June 9, 1952 defendant reported the sale on June 6, 1952 of the 32 shares of the capital stock

-4-

of the Acme-Lane Company, Inc., to D. M. Pavlec (the Donna Pavlec hereinabove mentioned) for the sum of \$10,000 in cash, the highest sum obtainable; that Donna Pavlec was acting as the nominee of defendant, who was the real purchaser of the shares of stock; that defendant did not as administratrix receive the \$10,000 or any part thereof on or prior to January 31, 1953; that since the sale defendant and her daughter have personally taken possession of the assets of the Acme-Lane Company, operated it as the property of defendant and withdrawn certain profits therefrom; (c) that immediately upon defendant's appointment as administratrix she has been drawing a salary from the Lane Stewart Company and has not rendered any service of value to the company; that she caused the salaries of certain employees of the company to be materially increased without justification; that she caused her daughter to be employed by the company and by Acme-Lane at salaries far in excess of those customarily and usually paid for such services; that defendant's salaries from both of the companies were likewise greatly in excess of the salaries customarily and usually paid for the services;(d) that defendant transferred title to the Buick automobile to her son-in-law, to be sold by him at the appraised value of \$550, which sum was much less than the market value of the automobile at time of sale. Defendant moved to strike the petition and motion and to dismiss same on the ground that the acceptance of the checks of defendant for their respective distributive shares constitutes a binding election

to abide by the terms of the account and estops plaintiffs and each of them from challenging the account. The motion of defendant was sustained and the petition of plaintiffs dismissed. On appeal to the Circuit court a like order was entered.

Defendant says that "This appeal presents the question: Can a distributee who has received and accepted his distributive share of an estate in accordance with the terms of a final account, come into court after the account is approved and question the validity of that account without even offering to return the money received?" Notwithstanding this limitation of the questions raised by the appeal, plaintiffs and defendant argue the sufficiency of the petition.

The contention of plaintiffs that the signature of William J. Lane to his receipt in full for his distributive share and his consent to the approval of the final account was not freely or willingly given, cannot be sustained. The check was delivered before the account was presented or approved, and at a time when defendant was under no obligation to deliver it without the receipt and consent which she requested. No facts are alleged to sustain the allegation of the motion.

Section 290 of the Probate Act requires that notice be given of the hearing on the approval of a final account, or that a receipt in full is exhibited or there is an appearance and waiver of notice by the heir. None of these

the first of these is the fact that the
 the second is the fact that the
 the third is the fact that the

the fourth is the fact that the
 the fifth is the fact that the
 the sixth is the fact that the

the seventh is the fact that the
 the eighth is the fact that the
 the ninth is the fact that the

the tenth is the fact that the
 the eleventh is the fact that the
 the twelfth is the fact that the

the thirteenth is the fact that the
 the fourteenth is the fact that the
 the fifteenth is the fact that the

the sixteenth is the fact that the
 the seventeenth is the fact that the
 the eighteenth is the fact that the

the nineteenth is the fact that the

requirements was met as to Daniel M. Lane. The check endorsed by him has no endorsement showing that it is being given in payment or discharge of any interest of the payee in the estate of the deceased. The amount of the check is less than the distributive share of Daniel M. Lane, as shown on the final account, and no inference can be drawn from the check favorable to the defendant. It is not contended that any notice was given Daniel M. Lane or that he entered his appearance and waived notice. The approval of the account and the discharge of the defendant as administratrix was not binding on him. He did not waive his right to move to vacate the order complained of by accepting the check. It was for a sum which was admittedly due him, it was uncontested and not an amount ordered to be paid by any order or decree of court at the time he received and cashed it. The cases cited by defendant are not applicable and he is not estopped from challenging the account. Bliss v. Seaman, 165 Ill. 422, 430. The order approving the report and discharging defendant as administratrix is a nullity as to plaintiff Daniel M. Lane and must be vacated as to him. In re Estate of Young, 346 Ill. App. 257.

The only allegation of misconduct of defendant requiring consideration by the trial court on remandment is that relating to the sale of the stock of The Acme-Lane Company, Inc. to defendant through her daughter. If the allegations of the petition are sustained on further hearing,

-7-

this sale is fraudulent. Davison v. Simater, 366 Ill. 139. The sale of the real estate was pursuant to a decree of the Superior court, and the Probate court has no jurisdiction of irregularities, if any, in that sale. The defendant shows receipt of the net proceeds of the sale and a proper accounting therefor. The ownership by the estate of stock in the corporations did not give the Probate court jurisdiction over the alleged charges of interference by defendant in the management of the corporations. The mere allegation that the appraised value of the automobile was much less than its market value at the time of sale is not sufficient to warrant the reversal of the order before us.

Because of the failure to comply with the statute and rules of the Probate court in respect to notice of the hearing on the final account, and the allegations relating to the sale of ^{the} stock of The Acme-Lane Company, Inc., the order is reversed and remanded for further proceedings without prejudice to the right of plaintiff Daniel M. Lane to amend his petition if such amendment is warranted by facts.

REVERSED AND REMANDED.

BURKE, P. J., AND FRIEND, J. CONCUR.

• *Phragmites australis* (Common reed)

1. *Phragmites australis* (Cav.) Trin. ex Steud.

100

... 1937 93 2.

1. *Phragmites* = *Phragmites communis* Trin. = *Phragmites australis* (Cav.) Rostk Schmidt

• *Journal of the American Medical Association*, 1997; 277:1009-1010

• • • • •

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

46457

BOBTEX INDUSTRIES, INC.,
Appellee,

v.

CONTINENTAL BAKING COMPANY, a
corporation,

Appellant.

4 1.A. 377^{2d}
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order granting a new trial in an action for property damage resulting from the collision between automobiles owned by the parties. Plaintiff has not appeared in this court.

The collision occurred in the morning of a winter day when the city street, covered by ice and snow, was slippery. The drivers of the respective cars were the only witnesses. Each testified to due care on his part and negligence by the driver of the other car. There is no evidence of physical facts to tip the scales. Plaintiff's witness said defendant's automobile left skid marks about 50 feet in length. On a former trial against defendant involving the same accident, in which the witness was plaintiff, he testified that the skid marks were only half as long. A woman employee of plaintiff was a passenger in its car. She was not called to testify. The inference is that her testimony would have been adverse to plaintiff. The verdict for defendant was not against the manifest weight of the evidence and a trial judge is not justified

-2-

in granting a new trial because he might, if sitting as a juror, arrive at a different conclusion. Grubb v. Illinois Terminal Co., 286 Ill. App. 499.

The order is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

BURKE, P. J., AND FRIEND, J., CONCUR.

The first of these is the fact that the
 system is not a simple one. It is a
 complex one, and it is not possible to
 describe it in a few words. It is a
 system of many parts, and it is not
 possible to describe it in a few words.

7

The second of these is the fact that the
 system is not a simple one. It is a
 complex one, and it is not possible to
 describe it in a few words. It is a
 system of many parts, and it is not
 possible to describe it in a few words.

32 A

46523

4 I.A.^{2d} 378

JOSEPH BRONGE, JR., a minor by
JOSEPH BRONGE, SR., his father
and next friend,

Appellant,

v.

MEMORIAL PARK DISTRICT, a municipi-
pal corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order striking his complaint as amended and entering judgment in favor of defendant in bar of plaintiff's action for personal injuries sustained in a swimming pool operated by defendant, a municipal corporation.

The complaint alleged that a fee was charged for the use of the swimming pool; that it was operated at a profit and that the privileges of the pool were open to all persons without regard to their residence. The motion to strike was based on the ground that in the operation of the pool the defendant, a municipal corporation, was exercising a governmental function. Plaintiff opens his argument with the statement that he "is well aware of the decisions, of this State, holding that the operation of a swimming pool, by a municipality is not a corporate function, but is governmental, exempting such municipal corporation from liability." He cites cases, the leading one being Gebhardt v. Village of La Grange Park, 354 Ill. 234. He argues extensively that the change of conditions,

-2-

the broadening of the operations of municipal corporations and the trend of opinions in other states indicate that the prior holdings of our Supreme court should be reversed. . Plaintiff's argument cannot be entertained by this court. If the policy of the state in respect to liability of municipal corporations exercising governmental functions is to be changed, it must be changed by the Supreme court or the Legislature.

The order and judgment are affirmed.

AFFIRMED.

BURKE, P. J., AND FRIEND, J., CONCUR.

10

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

33 A

46544

PORTIA BAKER, INEZ LEGARDY,
THURLOW HASKELL, ARLENE DUNN
and ANTONIO HASKELL, Heirs
at Law of RALPH G. FREEMAN,
Deceased,

Appellants,

v.

MARY B. FAULKNER,

Appellee.

4 I.A.^{2d} 378

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a judgment for defendant in an action of forcible detainer.

The statement of claim merely charges that plaintiffs are entitled to possession of the described premises and that defendant unlawfully withholds possession thereof. There is no report of proceedings or statement of facts showing the proceedings before the trial court. The burden of showing the alleged errors of the court rests upon the party appealing. Anthony v. Gilbrath, 396 Ill. 125. In the absence of a report of proceedings or statement of facts there is a presumption that the evidence was sufficient to support the findings made and to justify the conclusion reached by the trial court. Woodson v. Benson, 330 Ill. App. 248 (abst.).

The judgment is affirmed.

AFFIRMED.

BURKE, P. J. AND FRIEND, J., CONCUR.

THE NATIONAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20535
JANUARY 10, 1964
MEMORANDUM FOR THE DIRECTOR
SUBJECT: [Illegible]

TO: [Illegible]
FROM: [Illegible]
SUBJECT: [Illegible]

[The following text is extremely faint and largely illegible. It appears to be a memorandum or report containing several paragraphs of text, possibly detailing an investigation or administrative matter. Key words like "subject", "information", and "report" are faintly visible.]

46351

KATHERINE VAN OFFELIN and
WILLIAM W. DE YOUNG,

Appellees,

v.

PETER DE YOUNG, GERRIT DE YOUNG, and
JENNIE DE YOUNG, his wife, FIRST
NATIONAL BANK OF BLUE ISLAND, a
corporation, as Trustee under Trust
Deed recorded as Document No. 15128225,

Defendants.

GERRIT DE YOUNG and JENNIE DE YOUNG,
his wife,

Appellants.

4 1A^{2d} 379

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Complainants brought this action to foreclose a trust deed upon certain real estate, given by defendants Gerrit De Young and Jennie De Young to secure their two notes. Defaults in payment of interest were alleged and the entire amount was declared due. Summons and alias summons issued against the latter named defendants were returned not found. Publication was had in conformity with the statute, and a default entered for want of appearance. The cause was referred to a master, who filed his report recommending a decree of foreclosure.

Within 30 days said two defendants filed a motion, supported by affidavit, to vacate the decree by default, alleging they had never been served, although they lived at the address at which the summons was directed, and that they never made any effort to avoid service. The affidavit

admitted existing default in the payment of interest and the demand for payment; alleged that there was a dram shop suit pending against the property, and to avoid the possible effect of said dram shop suit, said two defendants consented to a conveyance of the title to the premises to the nominee of the plaintiffs; and that it was the understanding between said defendants and plaintiffs that whenever they could pay up the amount of the mortgage indebtedness, the property would be reconveyed to said defendants.

The motion and affidavit were filed without notice to plaintiffs and without leave of court. Plaintiffs filed a motion to strike the motion to vacate, and an order was entered denying the motion to vacate, from which order this appeal is prosecuted.

The motion to vacate the decree having been filed without notice to the plaintiffs and without leave of court was in violation of Rule 20, §7, and Rule 21, §§1 and 4, of the Superior Court. The court was therefore justified in the exercise of its sound discretion to deny said motion to vacate.

The affidavit in support of the motion did not set up any meritorious defense. No definite time was stated as to when the defendants should pay the admitted obligation in order to secure reconveyance. It stated legal conclusions and not facts which would establish the extinction of the obligation evidenced by said notes. The mere transfer of the title to a nominee, under the circumstances alleged in

1. The amount is changed and it should be the same as the original amount.

1. "I have not been able to find any other references to this

James Earl Ray: "I am not a Jew, I am a Jew."

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said Court, at the City of New York, this 14th day of May, 1964.

Reviewed on 8/27/01 by [redacted] and [redacted] and [redacted]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1. DATE OF APPLICATION FOR INCREASE 11/11/2011

1. What is the purpose of the study?

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Journal of Management Studies, 19(1), 67-80.

70 2011年10月 第26卷第10期 中国海洋大学学报(社会科学版)

• *Staphylococcus aureus* (100%)
• *Staphylococcus epidermidis* (90%)
• *Staphylococcus saprophyticus* (80%)
• *Staphylococcus carnosus* (70%)
• *Staphylococcus sciuri* (60%)
• *Staphylococcus hyicus* (50%)
• *Staphylococcus pasteuri* (40%)
• *Staphylococcus saprophylus* (30%)
• *Staphylococcus epidermidis* (20%)
• *Staphylococcus aureus* (10%)

[illegible]

From 1987 to 1990, the number of cases of AIDS in the United States increased from 1,000 to 15,000.

STATIONER & PRINTER

Journal of Management Studies, 1987, 20(6), 631-641

[illegible]

U.S. DEPARTMENT OF AGRICULTURE

[illegible]

-3-

the affidavit, does not in and of itself constitute a satisfaction of the debt. There are no facts alleged which would prove that the parties had agreed to the extinguishment of the debt by the transfer of the title to the nominee. In the absence of such averments, the pleading being construed against the pleader, it will be considered such transfer was made as additional security. Illinois Trust Co. v. Bibo, 328 Ill. 252, 259; Williams v. Griffith, 310 Ill. App. 574, 579. There is nothing shown here to indicate that defendants' right to redeem has been prejudiced.

The order appealed from is affirmed.

AFFIRMED.

KILEY, P.J., AND LEWE, J., CONCUR.

41 A

4 L.A. 380

Appellant.

"First, You said that about two months ago, you had paid for the carpeting that was laid in your office amounting to about \$325.00. About a month ago, you had paid \$186.00 for the glass and \$45.00 for the

wicker partition in your office to the Pittsburgh Glass Co. You paid \$35.00 for the tile and that you have a waiver from Youngblood for your paper hanging. The only thing that is unpaid, according to you, is the \$425.00 bill for the construction of the wall which you said you can settle for \$250.00.

"#2. You and I agreed that you were going to show either Arnold Schwartz or John McKinlock the paid bills and the waiver from Youngblood, which either one of them can verify.

"#3. You agreed to give Arnold Schwartz or his representative, John McKinlock, either the \$250.00 in cash to settle the \$425.00 construction bill for the wall or to pay any other sum to settle this particular bill.

"#4. You also agreed to pay \$200.00 per month on the first of each and every month for your leased office in the Fine Arts Bldg. The first of said monies to be paid at the beginning of the week of December 21st, 1953, for the December 1953 rent, at which time you would present the other matters as hereinabove related.

"#5. You are to receive a letter from the office of the Fine Arts Bldg., signed by the proper authority, that you are to have possession of your present office in the Fine Arts Bldg., to and including April 30th, 1954, at which time you will surrender the keys and move out of these premises without any notice being served upon you. It was further understood that if said rent of \$200.00 per month was not paid on the 1st of January 1954 and the first of each and every month thereafter, until this agreement has been terminated, then the owners of the Fine Arts Bldg., will not have to serve notice upon you for termination of this agreement, but can go into court and file a dispossess action against you on the second day of any month that said rent had not been paid as hereinabove stated.

"I am happy this matter has been cleared up amicably, as I would like the three of us to always remain friends.

"With kindest personal regards to you and your family and with best wishes for a happy and prosperous New Year, I am

Sincerely,

/s/ Paul."

Defendant claims that this letter constitutes a new tenancy, which vitiated the notice of termination of tenancy dated November 27, 1953, and that the court erred in ruling the letter inadmissible in evidence. The record discloses that when the letter was offered in evidence, the court reserved a ruling until proof made by the defendant of compliance with the conditions precedent embodied in the letter. The defendant offering no proof, the court refused to admit the letter in evidence. We think the ruling was correct. The letter imposed conditions precedent which required performance to entitle the defendant to an extension of the tenancy. He offered no proof of compliance with the conditions precedent and, therefore, the proposed extension of the tenancy was not binding upon plaintiffs.

We find no defense in the record to plaintiffs' action, and the judgment is affirmed.

AFFIRMED.

KILEY, P.J. AND LEWE, J., CONCUR.

205

A

4 1.A. 2d 586

46356

| | | |
|------------------|---|-----------------|
| CITY OF CHICAGO, |) | APPEAL FROM |
| |) | |
| Appellee, |) | |
| |) | MUNICIPAL COURT |
| v. |) | |
| |) | |
| JOHN KUROWSKI, |) | OF CHICAGO. |
| |) | |
| Appellant. |) | |

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The City of Chicago filed a complaint averring that John Kurowski, who owned and maintained a building at 4609 Wrightwood Avenue, Chicago, violated Section 5 of the Zoning Ordinance in that he "did not remove kitchen in attic making building a two flat, the aforesaid premises being located in a district zoned as a Family Residence District." He was found guilty, assessed a fine of \$50 and judgment was entered on the finding, from which he appeals.

An agreed statement of facts says that the evidence disclosed that in 1948 the defendant purchased the premises improved with a house located in a block zoned for one family dwellings; that residing with him were his wife, a son and a daughter; that in March, 1953 defendant obtained a permit to construct dormers and a bathroom on the second floor; two bedrooms and a bath were constructed in the attic; that he also constructed a kitchen and installed therein a kitchen sink, a refrigerator and a cooking stove; that the sink was installed without a permit "but the City would not issue a permit if requested"; that at the time of the trial the premises were occupied by the defendant, his wife, his son and his son's wife, the son having married; that the

occupants are related to the defendant either by blood or marriage; that no part of the premises had been rented or occupied by persons not so related; and that the defendant does not intend to rent "any portion of the premises nor permit the occupancy of the premises by any person not a member of his family."

Section 2 of the Zoning Ordinance defines "family residence" as "a building entirely separated from any other building by space, designed, arranged, used or intended to be used as one apartment," and defines "apartment" as "a room or suite of rooms arranged, designed, used or intended to be used as a single housekeeping unit." Section 5 states that a permitted use in a family residence district is: "Family residence for use by persons related to one another * * *."

In urging a reversal defendant asserts that his residence is not arranged, intended or designed to be used by more than one family. The parties are in agreement that a question of fact to be determined from all the circumstances is presented to the court. When the complaint was filed the premises were occupied by the defendant, his wife, son and his son's wife. Defendant asserts without contradiction that there is no separate or private stairway to the attic and no means of access thereto except through the living quarters on the first floor. Plaintiff disclaims the theory attributed to it by the defendant that since the building contains two kitchens it is a two family dwelling, and asserts that the question is whether the premises have been arranged, designed, used or intended to be used as a single housekeeping unit or for two housekeeping units.

The defendant is charged with violating Section 5 of the Zoning Ordinance in that he did not remove the kitchen in the attic "making building a two flat," the premises being located in a district zoned as a family residence district. He obtained a permit to construct dormers and a bathroom. "As a result of this remodeling" two bedrooms and a bath were constructed in the attic. He also constructed a kitchen and installed therein a kitchen sink, a refrigerator and a kitchen stove. The sink was installed without a permit, but the City would not issue a permit if requested. From the complaint and the testimony it appears that the theory of plaintiff was that the violation consisted in the failure of the defendant to remove the kitchen. The stipulation indicates that the plaintiff considered the installation of the kitchen sink to be of special significance. The ordinance permits the use of a family residence by persons related to one another. The premises are occupied by the defendant, his wife, his son and his son's wife. The parties are related. It is a well known fact that there are many homes with auxiliary kitchens.

In our opinion the house retains its character as a family residence. It will be observed that the evidence shows that the defendant does not intend to rent any part of the premises nor permit the occupancy thereof by any person not a member of the family. The complaint and the evidence in the stipulation do not support the judgment. Therefore the judgment of the Municipal Court of Chicago is reversed. Our views are limited to the case at bar and should not be considered a precedent in the construction of the Zoning Ordinance.

JUDGMENT REVERSED.

FRIEND, J., and NIEMEYER, J. CONCUR.

1. The first part of the paper discusses the importance of maintaining accurate records of all transactions. It is essential for the company to have a clear and concise system in place to ensure that all data is properly recorded and stored. This will help in the future when it comes to analyzing the data and making informed decisions.

2. The second part of the paper focuses on the importance of having a strong and secure network. It is crucial for the company to invest in a reliable network that can handle all the data and transactions. This will help in ensuring that the data is always available and secure.

3. The third part of the paper discusses the importance of having a strong and secure database. It is essential for the company to have a database that can store all the data and transactions. This will help in ensuring that the data is always available and secure.

4. The fourth part of the paper focuses on the importance of having a strong and secure system of controls. It is crucial for the company to have a system of controls that can monitor all the transactions and ensure that they are properly recorded and stored. This will help in ensuring that the data is always available and secure.

5. The fifth part of the paper discusses the importance of having a strong and secure system of reporting. It is essential for the company to have a system of reporting that can provide all the necessary information to the management. This will help in ensuring that the data is always available and secure.

6. The sixth part of the paper focuses on the importance of having a strong and secure system of auditing. It is crucial for the company to have a system of auditing that can check all the transactions and ensure that they are properly recorded and stored. This will help in ensuring that the data is always available and secure.

7. The seventh part of the paper discusses the importance of having a strong and secure system of backup. It is essential for the company to have a system of backup that can store all the data and transactions. This will help in ensuring that the data is always available and secure.

8. The eighth part of the paper focuses on the importance of having a strong and secure system of recovery. It is crucial for the company to have a system of recovery that can restore all the data and transactions. This will help in ensuring that the data is always available and secure.

9. The ninth part of the paper discusses the importance of having a strong and secure system of maintenance. It is essential for the company to have a system of maintenance that can keep all the data and transactions up to date. This will help in ensuring that the data is always available and secure.

10. The tenth part of the paper focuses on the importance of having a strong and secure system of security. It is crucial for the company to have a system of security that can protect all the data and transactions. This will help in ensuring that the data is always available and secure.

206

A

46380

ANGELINA LEONE,
Appellant,

v.

CLIFFORD H. SPATH,
Appellee,

JOHN DEL GIORNO,
Defendant.

1 4 1.4^{2d} 586
APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Angelina Leone filed a complaint against Clifford H. Spath and John Del Giorno for personal injuries sustained on December 12, 1949, when the Del Giorno automobile and the truck operated by Spath collided at the intersection of Mannheim Road and Harrison Street in Bellwood. Plaintiff was a passenger in the automobile of Del Giorno and received permanent and severe injuries. The action against Del Giorno was predicated upon alleged willful and wanton conduct and that against Spath upon the negligent operation of his truck. The jury returned a verdict against Del Giorno for \$35,000 and in favor of Spath. Judgment was entered on the verdict. Plaintiff's motion for a new trial as to Spath was denied. On motion of plaintiff the judgment against Del Giorno was vacated without prejudice and later, upon stipulation of the plaintiff and Del Giorno, the cause was dismissed as to him. Plaintiff appeals from the judgment in favor of Spath, hereinafter called the defendant.

Plaintiff was riding in the back seat of an automobile driven by Del Giorno in an easterly direction on Harrison

-2-

Street. Defendant was driving a truck in a northerly direction on Mannheim Road approaching its intersection with Harrison Street. Mannheim Road runs north and south and is a four lane paved highway with painted lines designating the lanes of traffic. Harrison Street running east and west intersects Mannheim Road at right angles and at or near the intersection is a wide two lane highway. There is a "stop sign" on a telephone post on the southwest corner of the intersection approximately 3 feet from the west edge of the pavement on Mannheim Road and about the same distance south of the edge of the pavement of Harrison Street. There are "slow" signs for traffic on Mannheim Road at the intersection. There are no stop signs on Mannheim Road for observance by traffic northbound or southbound on that road.

The defendant was driving his truck as he approached the intersection with Harrison Street in the east or outer lane at a speed of 25 to 30 miles an hour. The posted speed limit on that road was 45 miles an hour. He was familiar with the intersection and had driven along there many times in prior months. When he was approximately 150 feet south of Harrison Street he noticed the Del Giorno car to his left approximately 150 feet west of the intersection, apparently starting to slow down for the intersection from about 35 to about 30 miles an hour. At the same time a northbound car passed defendant's truck on his left and he temporarily lost sight of the Del Giorno

automobile. The northbound automobile completely passed defendant's truck when the latter was approximately 80 feet south of Harrison Street. Defendant's truck was about 25 to 30 feet south of Harrison when the northbound automobile cleared that street. At the time the northbound car passed defendant's truck he saw a southbound truck on Mannheim Road coming toward the intersection. Defendant saw Del Giorno's car again just before it came to the stop sign at Mannheim Road.

Del Giorno drove his car through the stop sign and into Mannheim Road without reducing his speed of 25 to 30 miles an hour. When the defendant saw the Del Giorno car entering Mannheim Road he applied his brakes. He was then 20 to 60 feet south of Harrison Street. His brakes were in good operating condition. With continuous application of the brakes he reduced his speed from 30 or 35 miles an hour to 20 miles an hour at the ^{south} edge of Harrison Street and to 15 miles an hour at the point of impact. It is undisputed that the collision took place in the east lane of Mannheim Road and that the front of defendant's truck hit the right side of Del Giorno's car. Defendant did not sound his horn or give any other warning. A witness for defendant who corroborated the testimony as to defendant's speed before he applied the brakes had a somewhat higher estimate of the speed of defendant's car at the time of the impact than 15 miles an hour. This witness heard the screeching accompanying the application of brakes by someone, and he said that the eastbound car did not slow down or alter its speed until the collision. A witness for defendant who was driving a southbound truck on Mannheim Road was forced to slow down and swerve his truck to

avoid Del Giorno's car as it ran through the stop sign and passed in front of his truck, and he said he barely missed a collision with Del Giorno's car. The defendant said that he was afraid to swerve to the left because of the possibility of tangling with the southbound truck and the DelGiorno car, so he directed his efforts towards stopping his truck before it hit the Del Giorno car. He put on his brakes with all his might and main. Del Giorno made no effort to stop or turn his car to the left to avoid a collision although there was nothing to prevent his swerving. Del Giorno admitted at the trial that he could not see very well and that he was not wearing glasses at the time of the occurrence. A witness for defendant said that the collision occurred on the east side of Mannheim Road and ended up on the north side of Harrison Street. He also said that he heard the screeching of brakes and examined the tire marks made by defendant's truck, that they were probably 10 to 12 feet in length, constituted black streaks in the road, and projected from the rear wheels of the truck as it stood after the occurrence to a point 12 to 15 feet in back of it. This witness testified that there were no vehicles in the inner north lanes of Mannheim Road and that there was nothing to prevent the northbound truck from altering its course of travel from the outer lane to an inner lane of traffic. Del Giorno testified that he stopped his car at the intersection. Defendant testified that Del Giorno did not bring his car

to a stop at the intersection.

Arguing that the judgment is against the manifest weight of the evidence, plaintiff says that the collision was the result of the combined actionable conduct of Del Giorgio and the negligence of the defendant. There was a conflict in the evidence as to whether Del Giorgio stopped his car before entering Mannheim Road. There was also a conflict in the testimony as to the speed of the respective vehicles. This conflict of evidence presented a question of fact for the jurors, who saw and heard the witnesses. There was ample support for the verdict. There was evidence that the defendant put on his brakes as soon as he saw the Del Giorgio car enter the intersection and that he continuously applied his brakes until the impact. Plaintiff asserts that the defendant had ample time to bring his truck to a stop after he saw the Del Giorgio automobile pass the stop sign and enter the intersection. This was a question of fact which the jury was competent to decide.

Plaintiff urges that the defendant could have avoided the mishap by turning to his left into the center lane for northbound traffic thus passing around the Del Giorgio car, as that ~~lane~~ lane was clear of traffic after defendant's car had passed the truck 40 to 50 feet south of the intersection. The defendant thought that he could not turn the truck to the left because there was a swerving southbound truck to his left which had almost collided with the Del Giorgio car immediately previous to the collision,

and because he was afraid he would get tangled up with the southbound truck and the Del Giorno car if he swerved to his left. The defendant had his brakes on "hard" which would interfere with steering maneuverability. He suggests that if he had released the pressure on his brakes and turned into the inner lane he might have struck the Del Giorno car while traveling at a higher speed and that if Del Giorno had applied his brakes too the collision might have occurred in the inner lane. It was within the jury's province to find that defendant's actions were those of a reasonably prudent man when he was confronted with a sudden danger created by the willful and wanton act of Del Giorno. Plaintiff states that defendant should have applied his brakes sooner. Defendant testified that he applied his brakes immediately when he saw the Del Giorno car go through the stop sign. Under the evidence and the instructions we believe the jury had a right to say that the defendant was not negligent in failing to sound the horn. We agree with the defendant that the evidence supports the conclusion that the sole proximate cause of the mishap was the willful and wanton misconduct of Del Giorno.

Plaintiff maintains that the court committed reversible error in instructing the jury that a statute, authorizes the Department of Public Works and Buildings, when traffic conditions warrant, to give preference over traffic crossing or entering such highway by erecting appropriate stop signs or stop lights, and that in such

cases vehicles entering upon or crossing the highway shall come to a full stop as near the right of way line of the highway as possible and regardless of directions shall give the right of way to vehicles upon the highway, and that the jury may and should consider the statute and take it into account when passing upon and considering the questions of negligence or contributory negligence. Plaintiff asserts that there is no showing that the "stop" sign was placed there by the "department." The stop sign is shown in a photograph introduced by plaintiff and on the violation of which she based her case against Del Giorno. In Graham v. Dressen, 292 Ill. App. 15, 26, the court held that an instruction on the statute is proper where the evidence shows the existence of a standard stop sign, and that it is unnecessary that there be evidence that the department caused the stop sign to be erected.

Plaintiff also states that the instruction was erroneous because it is inapplicable to an action between a guest in one car and the operator of another motor vehicle. She says that the law is well established that once an automobile coming onto a through highway is lawfully on that highway a motorist on a through highway must recognize the presence of that automobile and use due care to avoid a collision. Under the evidence the violation of the statute by Del Giorno had a bearing on whether or not defendant or plaintiff exercised reasonable care. The jury had a right to know about the law in determining

whether the defendant and plaintiff should be found negligent or contributorily negligent, respectively. Furthermore, if Del Giorno had stopped at the stop sign he would still have had the statutory duty of ascertaining whether he could safely proceed across the highway. Under the factual situation presented the court did not err in giving the instruction.

Finally, plaintiff urges a reversal on the ground that the verdict was the result of a prejudicial argument made in behalf of the defendant. She says that counsel attempted to have the jury put itself in the position of the defendant in passing on the issues. The argument of the attorney for the defendant was to the effect that his client acted as a reasonable man in the exercise of ordinary care and we do not believe it was prejudicial.

For the reasons stated the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., AND NIEMEYER, J., CONCUR.

207

A

7

46383

ABBIE DANIELS,

Appellee,

v.

CHICAGO TRANSIT AUTHORITY,
a municipal corporation,
Appellant.

4 I.A.^{2d} 587

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in tort for personal injuries resulting from a fall on a stairway owned and maintained by defendant, Chicago Transit Authority. Trial by jury resulted in a verdict in her favor for \$12,000.00. After overruling motions for judgment notwithstanding verdict and for a new trial, the court entered the judgment from which defendant appeals.

The accident occurred about 8:15 a. m. December 27, 1949, when plaintiff was en route to her place of employment, located at 200 East Ontario street. She had taken the Lake Street Elevated and gotten off the train at the south end of the west platform of ^{the} Randolph-Wabash station. It was an exceptionally bad morning, the streets and walks being covered with ice. Plaintiff was wearing oxford walking shoes with a one and one-half inch heel, and rubbers, and was carrying a purse. She had alighted from the last coach of the elevated train, and as she walked north on the platform she observed sand, gravel and small stones along the edge of the platform where passengers board and alight from trains. She

100

100

[illegible]

1. *Phragmites australis* (Cav.) Trin. ex Steud. (Common reed)

• 21

1870

1. 1000

1990

[Faint handwritten notes or bleed-through from the reverse side of the page.]

-2-

estimated the stones as varying in size up to one-half inch in diameter.

The west Randolph-Wabash platform has two closed-in stairways with a roof overhead. When plaintiff reached the northern stairway exiting to the south, she started down, holding the handrail with her right hand, and looked down at each step as she descended. Several people passed her, and she was one of the last to come down from her train. There was no one directly in front of her or beside her. She said that she fell when she reached the third or fourth step from the bottom, and then lost consciousness. She testified that she stepped on a stone about one-half inch in diameter which caused her to plunge forward, saying that "I knew that I had stepped on a stone because I had walked on them on the platform and felt them. It was the same thing." There ensued the following colloquy, after which the court sustained defendant's objection to the testimony:

"The Court: Yes, but what she felt on the platform would not indicate it was the same kind of an article she stepped on that caused her to fall . . ., and your question was: 'What caused you to fall?' and she said, 'A stone,' and then you asked her how did she know it was a stone. The fact that there was a stone upstairs certainly is no indication it was a stone on the step.

"The Witness: The object I stepped on felt hard, very hard.

"Q: And how big was it,

... ..

...

... ..

... ..

... ..

... ..

... ..

... ..

"A: Well, it was just like I had stepped on the platform, and they were at least---

"Mr. Parsons: (Interposing.): No, I object.

"The Witness: (Continuing.): ---half inch or a little smaller.

"The Court: That part about the platform may be stricken. The rest of it may stand."

Plaintiff testified that she had not seen any sand, gravel, stones or other foreign objects on any of the steps as she descended, nor did she see any stone at any time either before or after her fall.

With the exception of two physicians, whose testimony was confined to the nature and extent of her injuries, Ronald Lindsay was the only other witness offered by plaintiff. At the trial he testified that he was coming down the south stairway and saw plaintiff fall; since others were coming to her aid he ran past her to the head of the north stairway where he directed exiting passengers to use the south ~~stairs~~. He stated that the stairway was unlighted, but added that lights were not needed. About a month after the accident he had given a signed statement to defendant in his own handwriting when, as the witness ~~himself~~ commented, the facts were fresher in his mind; at that time he had said the stairs were dry and in good condition, and that on the day of the accident he did not notice any stones, gravel or debris on the stairway.

Plaintiff prepared twelve written interrogatories before trial, all of which were answered. Most of these had to do with the spreading of the sand and the gravel on the platform where the passengers boarded and alighted from trains, and the quality of material used. Defendant's answers indicate that sand was used to prevent slipping; that on December 27, 1949 the platform and steps in question were sanded and swept by a porter who was charged with that duty; that the Material Service Corporation furnished the material according to the following specifications: "The Torpedo Sand furnished shall be in full compliance with the following specifications: (a) The sand shall be clean, sharp, washed and screened, free from dust, loam, dirt and any foreign material. (b) The sand shall be uniformly graded within the following limits, and shall conform to the Standard Specifications for Road and Bridge construction, State of Illinois Department of Public Works and Buildings, Division of Highways, Section 105, for Fine Aggregate for Portland Cement Concrete, as amended by supplemental specifications of April 15, 1949." The written interrogatories and answers thereto were introduced in evidence by plaintiff and read to the jury. They showed that defendant used sand in and about the platform steps of the station in order to prevent slipping, and that the platform and steps in question were sanded and swept by the station porter on December 22, 23, 24, 25, 26 and 27, 1949. Since the porter who was charged with this duty

died January 1, 1951, his testimony was not available upon trial.

In her complaint plaintiff alleged generally that defendant was chargeable with carelessness and negligence in the operation and control of its elevated stairs; that it "permitted and allowed foreign matter and debris to form and remain" thereon, "for a long period of time, well knowing, or in the exercise of ordinary care should have known, said foreign matter and debris was on said stairs." There is a failure of proof as to these allegations in several respects. First, there is no evidence of probative value as to what caused plaintiff's fall. The only intimation in the case that she stepped on a stone is her own testimony in which she stated this to be a fact, but an analysis of the evidence discloses that she did not know what she stepped on; her testimony is mere surmise, as indicated by the colloquy of court and counsel which shows that she had two reasons for this assumption: (1) the way the object felt when she stepped on it, and (2) her belief that it felt the same underfoot as had stones on which she had stepped previously. She admitted that she never saw the object which caused her to fall, and her only other witness said in a pretrial statement that he did not notice any stone, gravel or debris on the stairway. The law is well settled in Illinois that liability cannot rest on speculation, conjecture or surmise, but must be based upon facts established

10

Figure 1. The effect of the initial concentration of the monomer on the polymerization of α -methylstyrene initiated by $\text{C}_6\text{H}_5\text{MgBr}$ in THF at -78°C . The concentration of the initiator was 0.01 mol/L . The polymerization was terminated by the addition of methanol.

by competent evidence fairly tending to prove it. Shaw v. Swift, 351 Ill. App. 135; Peterson & Co. v. Industrial Board, 281 Ill. 326. The liability which plaintiff attempts to establish is premised on her theory that defendant should have contemplated the possibility of a stone falling down the stairs. This was not pleaded, it is in the nature of an afterthought, and at best it is speculative. The second failure of proof is the silence of the record on the indispensable element of her case that defendant had actual or constructive notice of the presence of such a stone. Plaintiff contends that since defendant spread the gravel on the platform it should be presumed to have anticipated that a stone or stones might be kicked down by passengers from the platform to the stairway, and that therefore the rule as to actual or presumptive notice cannot here be invoked. While it is true that passengers are entitled to care, not carelessness, in the practice of safety measures, plaintiff's theoretical version of the accident cannot, in the absence of competent supporting evidence, be treated as a fact. Moreover, there is uncontradicted proof that the stairs were sanded and swept every day, indicating a systematic degree of care taken for the safety of passengers.

The decisions cited by plaintiff are not applicable to the circumstances of this case. In substantially all of them, a dangerous condition admittedly existed for a long enough period of time to afford actual or constructive

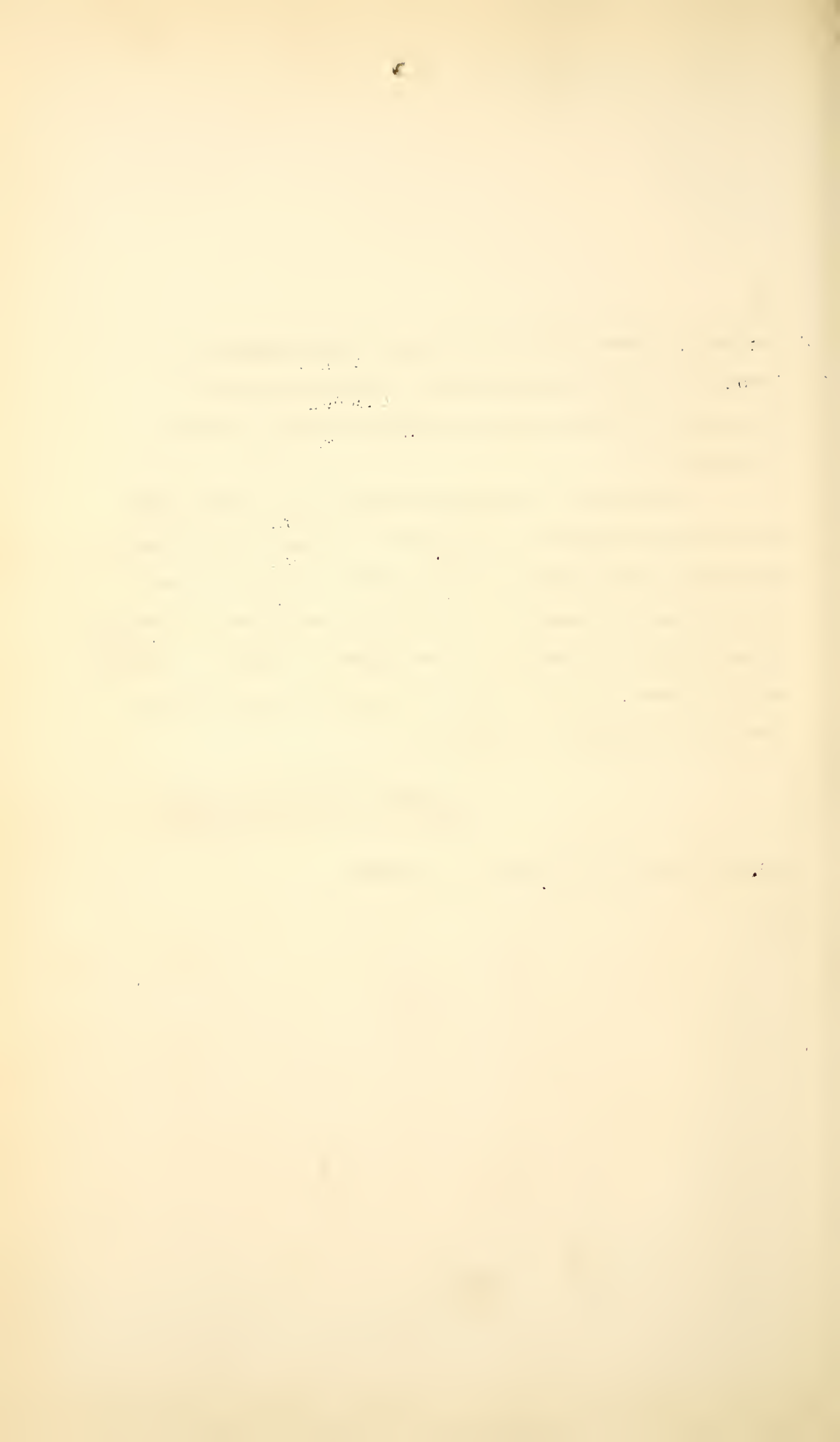
-7-

notice; in other words, there was in each instance a condition of long standing which was conceded to be the cause of the accident and which was known to the defendant.

In view of these conclusions, other points urged for reversal need not be discussed. We have decided that the trial court should have directed a verdict in favor of defendant or entered judgment notwithstanding the verdict. Accordingly, the judgment of the Superior Court is reversed and the cause remanded with directions to enter judgment for costs in favor of defendant.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P. J.; AND NIEMEYER, J., CONCUR.



208

A

46339

4 I.A.^{2d} 588

B. T. LILL, doing business
as LILL REALTY CO.,

Appellee,

v.

JAMES BURNS and CATHERINE BURNS,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment for \$1,130.00 entered against them in plaintiff's action for a real estate broker's commission on the sale of premises of the defendants, improved with a two-flat building, located on north Mulligan street in the City of Chicago.

Defendants had the property for sale in the early part of 1952. In April 1952 Raymond C. Cieslik visited the property and talked to defendant Catherine Burns, who asked \$25,000 for the property. Cieslik refused to pay that much. Defendants then placed the property with the Woodside Realty, who advertised it for sale. Cieslik went to the office of the realty company and was taken to the premises by its agent, Goldbeck. Cieslik told Goldbeck he had seen the property and did not care to examine it again. On May 10, 1952 defendants gave to plaintiff an exclusive agency contract for 45 days whereby they agreed to pay the commission recommended by the Chicago Real Estate Board on a "Sale Price \$23,500 Net to the Seller." Cieslik testifies that in answer to an advertisement of plaintiff he and his aunt went to plaintiff's office and were taken by plaintiff to defendants' property; that he told plaintiff he had seen the property, and he did

;

100

4

-2-

not examine it at that time. Plaintiff testifies that on June 22, 1952 he showed the property to Cieslik, his wife and his mother-in-law, Mrs. Getz; that they offered him \$23,000.00 for the property and he told them that about ten days before he had submitted a similar offer to defendants and they had refused it; that if they could raise the price to "twenty-three five we would have a good chance of getting the deal, and they refused at that time." Plaintiff made no further effort to sell the property to Cieslik and had no further contact with him. Defendants refused to extend the exclusive agency beyond June 25, 1952.

In the early part of July the defendants again advertised the property for sale. In the meantime Cieslik had returned to California where he had been living, disposed of property there and shipped his furniture to Chicago; he returned to Chicago, bringing with him his wife and her parents; in response to the latest advertisement of defendants he drove with his wife and her mother to defendants' property; when he stepped out of the automobile he saw it was the same property; Mrs. Getz wanted to see it and they went in; the women liked the property and they agreed on a price of \$22,600.00; a deposit was paid and the deal later consummated by a transfer of the property to Cieslik, his wife and her parents.

The testimony of plaintiff and Cieslik is in direct conflict on three immaterial matters: whether plaintiff took Cieslik to the premises in early June or on June

-3-

22nd; was Mrs. Getz with Cieslik and did they examine the property; did Cieslik tell plaintiff that he, Cieslik, had seen the property.

It is undisputed that Cieslik examined the property in April 1952 and was taken to the premises by Goldbeck of the Woodside Realty before he had any dealings with plaintiff; that plaintiff ceased his efforts to sell to Cieslik after he had taken him to the premises; that plaintiff had nothing to do with Cieslik's later contact with defendants and the sale of the property to Cieslik, his wife and her parents. Plaintiff was not the procuring cause of the sale and is not entitled to a commission. Chicago Title & Trust Co. v. Guild, 323 Ill. App. 608; Kaplan v. Birk, 349 Ill. App. 538 (abst.).

The trial court erred in denying the defendants' motion at the close of all the evidence to direct a verdict for defendants and in denying defendants' motion for judgment notwithstanding the verdict. The judgment is reversed.

REVERSED.

BURKE, P.J. AND FRIEND, J., CONCUR.

209

A

46352

4 1.A.^{2d} 588

JOHN HAAS,
Appellee,
v.
JOHN KING,
Appellant.

APPEAL FROM
COUNTY COURT
COOK CONTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

A judgment creditor, respondent in a proceeding under the Insolvent Debtors Act (Ill. Rev. Stat. 1953, chap. 72), appeals from an order entered in the County court releasing the petitioner from incarceration under a capias ad satisfaciendum issued on a judgment entered in the Circuit court of Cook county, the court finding that petitioner "is being held and detained without judicial process which is void for the following reasons: That the prayer for relief fails to request a finding of malice and fails to request satisfaction of said judgment by body execution and further that said judgment failed to order and provide for body execution." The judgment upon which the capias was issued was entered in a personal injury action for damages resulting from an automobile collision in which the court found that the defendant therein was guilty of malice and that malice was the gist of the action.

The County court lacked jurisdiction to enter the order appealed from. The Supreme court has uniformly held that the validity of process under which a judgment

-2-

debtor was seized and imprisoned cannot be questioned collaterally in a proceeding in the County court for relief under the Insolvent Debtors Act, as the debtor has a remedy by a motion to quash the writ and return in the court that issued the capias, and that the petition for discharge recognizes the validity of the capias.

Lipman v. Goebel, 357 Ill. 315; White v. Youngblood, 367 Ill. 632; Ingalls v. Raklios, 373 Ill. 404, p. 407.

The order appealed from is reversed and the cause remanded for further proceedings consistent herewith.

REVERSED AND REMANDED.

BURKE, P. J., AND FRIEND, J., CONCUR.

The first of these is the fact that the
 world is not a uniform whole, but is
 composed of many different parts, each
 of which has its own characteristics and
 its own laws. This is the first principle
 of the science of geography, and it is
 the foundation of all geographical knowledge.
 The second principle is that the world
 is not a static whole, but is constantly
 changing. This is the second principle
 of the science of geography, and it is
 the foundation of all geographical knowledge.
 The third principle is that the world
 is not a uniform whole, but is constantly
 changing. This is the third principle
 of the science of geography, and it is
 the foundation of all geographical knowledge.
 The fourth principle is that the world
 is not a uniform whole, but is constantly
 changing. This is the fourth principle
 of the science of geography, and it is
 the foundation of all geographical knowledge.

210

A

46387

4 1.A.^{2d} 589

JOHN KITSOS,

Appellee,

v.

GEORGE PRANTALOS,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree entered in an action for a declaratory judgment ordering, adjudging and decreeing that the plaintiff is the owner of and entitled to the real property described in the complaint and the owner of any and all rights of ownership of the defendant, as of October 10, 1950, of the fixtures, equipment, stock and good will of the tavern on the premises, subject to the rights of defendant to redeem within one year by paying to plaintiff \$14,423.87, the indebtedness found due to plaintiff from defendant, with 6 per cent annual interest, from October 10, 1950 to date of payment, together with the fees of the masters in chancery and the court reporter advanced by plaintiff.

Plaintiff's claim, as stated in the complaint, is that on October 29, 1945 defendant was the owner in fee simple of a lot and the building thereon at 672 N. Clark Street, Chicago, and the owner of certain personal property used in the operation of the tavern on the premises; that from said date to and including October 31, 1949 plaintiff advanced to defendant and to other persons at defendant's request the aggregate sum of \$12,812.20; that on the last

1871

1

1872

2

1873

3

1874

4

1875

5

1876

6

1877

7

1878

8

1879

9

1880

10

1881

11

1882

12

1883

13

1884

14

1885

15

1886

16

1887

17

1888

18

1889

19

1890

20

mentioned date the parties entered into a written agreement whereby defendant acknowledged his indebtedness to plaintiff and agreed to and did execute a collateral promissory note for \$12,812.20, with interest after date at 6 per cent per annum, and deposited as security therefor with one George Cheronas, as escrowee, a quitclaim deed conveying the real estate herein involved, and an assignment releasing to plaintiff defendant's right, title and interest in and to the tavern and the fixtures and personal property in the tavern; that defendant failed to make any payment on account of principal or interest of the note and on September 8, 1950 plaintiff notified him by registered mail that there was due to plaintiff, including interest and additional advances, the sum of \$14,423.87, and that if defendant failed to pay the amount within 30 days plaintiff would sell the collateral pledged for the payment of the note, as authorized in the agreement; that no payments were made and the collateral in the hands of the escrowee was sold at public sale on October 10, 1950 to plaintiff as the highest bidder for the total amount of the indebtedness due plaintiff; that plaintiff is now in possession of the real and personal property; that defendant has claimed from time to time that he is the owner of the property involved herein and that he would forcibly eject plaintiff and his agents from possession of the same. The prayer is for a declaratory judgment declaring that plaintiff is the sole owner of the real and personal property, and for an injunction.

The cause was referred to a master, who heard the evidence and recommended a decree in accordance with the prayer of the complaint. This report was approved by the court and a decree entered granting the relief sought. The cause is before us by transfer from the Supreme court, to which defendant appealed on the erroneous theory that a freehold was involved.

The position of defendant is shown by his testimony. He and plaintiff were born in the same town in Greece. Defendant has been in this country for many years, during which time he has been connected with taverns and public eating places. Nevertheless he claims to be unable to thoroughly understand the English language or transact business in that language. He testified through an interpreter, but answered some questions without waiting for a translation of them. On October 29, 1945 he was the owner of the lot and building at 672 N. Clark Street, subject to a mortgage for a large sum; he was repairing the building and needed money to complete the work and meet a payment due on the mortgage; he requested plaintiff and Cherones to obtain for him a loan of \$5,000 on a second mortgage, due in about three years; plaintiff agreed to advance the necessary money to meet defendant's needs, and he and Cherones presented to defendant for his execution a quitclaim deed conveying the premises to plaintiff; defendant executed the deed, relying as he claims on the representation that the deed was a mortgage; by October 31, 1949 plaintiff claimed an indebtedness due him of \$12,812.20, and at the suggestion of plaintiff, and

The first part of the document is a list of names and their corresponding numbers. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized into two columns, with the names on the left and the numbers on the right.

The second part of the document is a list of names and their corresponding numbers, similar to the first part. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized into two columns, with the names on the left and the numbers on the right.

The third part of the document is a list of names and their corresponding numbers, similar to the first two parts. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized into two columns, with the names on the left and the numbers on the right.

The fourth part of the document is a list of names and their corresponding numbers, similar to the first three parts. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized into two columns, with the names on the left and the numbers on the right.

The fifth part of the document is a list of names and their corresponding numbers, similar to the first four parts. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized into two columns, with the names on the left and the numbers on the right.

The sixth part of the document is a list of names and their corresponding numbers, similar to the first five parts. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized into two columns, with the names on the left and the numbers on the right.

The seventh part of the document is a list of names and their corresponding numbers, similar to the first six parts. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized into two columns, with the names on the left and the numbers on the right.

The eighth part of the document is a list of names and their corresponding numbers, similar to the first seven parts. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized into two columns, with the names on the left and the numbers on the right.

The ninth part of the document is a list of names and their corresponding numbers, similar to the first eight parts. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized into two columns, with the names on the left and the numbers on the right.

The tenth part of the document is a list of names and their corresponding numbers, similar to the first nine parts. The names are written in a cursive script, and the numbers are written in a simple, bold font. The list is organized into two columns, with the names on the left and the numbers on the right.

Cherones, whom defendant claims held himself out as a lawyer, defendant executed and delivered the instruments hereinbefore mentioned; after the purported sale of the collateral on October 10, 1950, plaintiff took forcible possession of the real and personal property and has remained in possession ever since.

The parties agree that the deed of October 29, 1945 was given as security for the payment of advances to be made thereafter by plaintiff, and the rights of plaintiff in the real property are based upon that deed. No rights in the real property were acquired by the sale of October 10, 1950. The interest, if any, of the defendant in the personal property passed to plaintiff by that sale. Defendant contends that an action for a declaratory judgment will not lie because plaintiff has an adequate remedy by foreclosure of the equitable mortgage created by the deed. This contention is answered adversely in American Civil Liberties Union v. Chicago, 3 Ill. 2d 334, 353, wherein the defendant claimed that the availability of affirmative relief by way of mandamus barred an action for a declaratory judgment. The court said that this contention is refuted by the explicit language of section 57-1/2 of the Civil Practice Act. (Ill. Rev. Stat. 1953, chap. 110, par. 181.1.)

Defendant further contends that plaintiff must bring a foreclosure suit to bar defendant's right of redemption. By the deed of October 29, 1945 plaintiff acquired full legal title to the property described therein, and the assertion of a right of redemption rested on the

-5-

grantor, or defendant herein. Deadman v. Yantis, 230 Ill. 243, 257; Fitch v. Miller, 200 Ill. 170, 181. However, in the instant case the court preserved defendant's right of redemption by specifically providing that the property, real and personal, might be redeemed within one year. Plaintiff does not object that the right of redemption has been extended to the personal property.

Defendant raises other objections to the decree based on disputed questions of fact which the master and trial court have found adversely to defendant. We have carefully examined each objection and the evidence upon which it is based. The findings of fact in the trial court are not against the manifest weight of the evidence. There is in evidence a statement of account signed by defendant showing his indebtedness to plaintiff to be \$12,812.20 on October 31, 1949. There is competent evidence of additional advances to support the ultimate finding of \$14,423.87 due to plaintiff. There is no evidence of payment by defendant. A further and separate discussion of each objection raised would unduly extend this opinion. We find no error in the rulings of the court. The decree gives effect to defendant's claim that the deed of October 29, 1945 was a mortgage and affords a right of redemption within the statutory period of one year applicable to mortgages. It is affirmed.

AFFIRMED.

BURKE, P.J. AND FRIEND, J., CONCUR.

1. The first part of the paper is devoted to a general discussion of the problem.

2. In the second part, we shall consider the case of a single particle.

3. The third part is devoted to the case of a system of particles.

4. In the fourth part, we shall discuss the results of our calculations.

5. Finally, we shall give some concluding remarks.

6. The first part of the paper is devoted to a general discussion of the problem.

7. In the second part, we shall consider the case of a single particle.

8. The third part is devoted to the case of a system of particles.

9. In the fourth part, we shall discuss the results of our calculations.

10. Finally, we shall give some concluding remarks.

11. The first part of the paper is devoted to a general discussion of the problem.

12. In the second part, we shall consider the case of a single particle.

13. The third part is devoted to the case of a system of particles.

14. In the fourth part, we shall discuss the results of our calculations.

15. Finally, we shall give some concluding remarks.

16. The first part of the paper is devoted to a general discussion of the problem.

17. In the second part, we shall consider the case of a single particle.

18. The third part is devoted to the case of a system of particles.

19. In the fourth part, we shall discuss the results of our calculations.

20. Finally, we shall give some concluding remarks.

21. The first part of the paper is devoted to a general discussion of the problem.

22. In the second part, we shall consider the case of a single particle.

23. The third part is devoted to the case of a system of particles.

24. In the fourth part, we shall discuss the results of our calculations.

211

A

4 1A 2d 590

46388

HARRISON MALONE,
Appellee,

v.

JOSEPH CANCELLA,
Appellant.

) APPEAL FROM
) MUNICIPAL COURT
) OF CHICAGO
)
)
)

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order vacating and setting aside a judgment rendered in his favor, quashing the capias issued thereon and releasing the defendant from custody, and from an order entered four days later refusing to vacate and set aside the above mentioned order.

September 17, 1953 judgment in favor of plaintiff for \$500 and costs, ~~xxx~~ based on a special finding of malice, and ordering that an execution issue against the body of the defendant was entered in plaintiff's action alleging false arrest and imprisonment, malicious prosecution and improper use and abuse of process. This judgment was entered on default of defendant for failure to appear after personal service of summons. In January following defendant was taken into custody on execution and brought before the judge who entered the original judgment. He refused to discharge the defendant. The defendant was thereupon taken before the judge from whose orders this appeal is prosecuted. He ordered that "judgment of September 17, 1953 be vacated, set aside and for naught esteemed, and

-2-

capias quashed." Immediately thereafter plaintiff filed a written motion, supported by affidavit, to vacate the last mentioned order. This motion was denied. An appeal was immediately perfected and the record brought before us. Defendant has not followed the appeal. It does, however, appear from the record that after appeal had been perfected defendant filed a petition to quash the service of summons on him, claiming that he had not been served. This motion was denied.

In the record before us we find nothing indicating error in the entry of the original judgment of September 17, 1953. No verified petition to vacate that judgment was filed and there is nothing in the record to indicate the grounds upon which the judgment was vacated on January 22, 1954. As more than 30 days had elapsed since the entry of the judgment in September, the court in the absence of special circumstances, which should appear in the record, was without jurisdiction to vacate the judgment.

The orders appealed from are reversed and the judgment of September 17, 1953 is in full force and effect.

ORDERS APPEALED FROM ARE REVERSED;
JUDGMENT OF SEPTEMBER 17, 1953
IS IN FULL FORCE AND EFFECT.

BURKE, P. J., AND FRIEND, J., CONCUR.

212

A

4 I.A.^{2d} 590

46409

| | | |
|------------------------|---|---------------|
| JACQUELINE DESIDERATO, | } | APPEAL FROM |
| Appellant, | | |
| v. | | CIRCUIT COURT |
| LOUIS JOHN DESIDERATO, | | |
| Appellee. | } | COOK COUNTY |

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing her petition to compel defendant to pay certain arrearages due for the support and maintenance of the minor children of the parties. The defendant has not appeared in this court.

Plaintiff originally instituted a suit for separate maintenance in the Superior court of Cook county in which a decree was entered directing the payment of certain sums for the support and maintenance of the children of the parties. Sometime thereafter she instituted suit for divorce in the Circuit court of Cook county and was awarded a decree. In the decree the court found that there was due her for maintenance and support under the separate maintenance decree the sum of \$1,493, which the court directed defendant to pay. The divorce decree also provided for future payments for the support and maintenance of the children. Some time thereafter a petition was filed in the Superior court of Cook county to enforce the payment of arrearages and support money. No order was entered and the petition was abandoned. Thereafter plaintiff filed her petition in the divorce proceeding to enforce the payment of the

-2-

amounts therein ordered to be paid by defendant, including the arrearages found to be due in the separate maintenance suit. A motion to strike the petition was made on the ground that plaintiff, having elected to proceed by petition in the Superior court, was barred from later proceeding in the Circuit court. This contention cannot be sustained. The decree in the divorce case operated as a dismissal or discontinuance of the separate maintenance suit without any formal order disposing of it. Harper v. Rooker, 52 Ill. 370. The error of plaintiff in attempting to proceed in the Superior court could not operate as an election barring her attempt to collect under the divorce decree. The remedies are not inconsistent and the doctrine of election does not apply. Wetterer v. Atchison, T. & S. F. Ry. Co., 277 Ill. App. 275.

The order appealed from is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

BURKE, P. J., AND FRIEND, J., CONCUR.

213

A

46473

DONALD JENKINS and LOIS ULLRICH,
Appellants,

v.

PENNSYLVANIA RAILROAD CO., a cor-
poration,

Appellee.

4 1.A.²¹ 591

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT

Plaintiffs appeal from a judgment for defendant entered on a verdict of not guilty in their action for personal injuries sustained as a result of a collision between an automobile in which they were riding as guests and a railroad train of the defendant at the intersection of defendant's tracks with 111th street in the City of Chicago east of Aberdeen street.

The accident occurred on Monday, July 11, 1945 at about 1:15 a. m. Plaintiffs were riding in the front seat with the driver. The car was being driven in an easterly direction and was struck by a northbound diesel engine pulling 25 cars loaded with steel, and ten empties. Neither the driver nor plaintiffs were familiar with the intersection. Jenkins, who was sitting in the middle, was looking straight ahead. He testified that he had had a tiring evening. Plaintiff Ullrich was leaning back and had her eyes closed. They claim they saw nothing indicating they were near a railroad crossing, and heard or saw nothing indicating the approaching train. They did nothing to warn the driver. 111th street is a four lane highway.

1. The first part of the

second part of the

third part of the

fourth part of the

fifth part of the

sixth part of the

seventh part of the

eighth part of the

ninth part of the

tenth part of the

eleventh part of the

twelfth part of the

thirteenth part of the

fourteenth part of the

fifteenth part of the

sixteenth part of the

seventeenth part of the

eighteenth part of the

nineteenth part of the

twentieth part of the

twenty-first part of the

twenty-second part of the

twenty-third part of the

twenty-fourth part of the

twenty-fifth part of the

-2-

The driver testified that he was driving in the inner lane for eastbound traffic and that shortly before he reached the tracks another automobile passed him on the right. He claims he saw nothing to warn him of the railroad crossing and did not see or hear the approaching train. Mr. and Mrs. Hess, called by plaintiffs, lived on 110th place, north of 111th street, and near the tracks. Each testified that he heard the rumble of the approaching train two or three minutes prior to the accident. Hess said he saw the headlight of the engine before the crash. Mrs. Hess also testified that she saw the headlight and said it was dim. Both testified that they did not hear a whistle or bell before the accident. Employees of the railroad testified that the engine bell was ringing, the headlight was lighted and an automatic crossing bell was also ringing. Traffic officers who arrived a few minutes after the accident testified that the headlight of the diesel was bright and the automatic bell was ringing. Defendant employs a watchman at the crossing until 11 o'clock p. m. Testimony shows that there was a sign "Watchman Off Duty" at the tracks on the south side of 111th street. There was also the usual railroad cross-buck sign, and underneath it reflectorized crossarms, indicating the railroad. The verdict is not against the manifest weight of the evidence.

Plaintiffs, however, urge that the trial court erred in certain rulings relating to evidence and in giving certain instructions offered by defendant. The first

-3-

objection relating to evidence is the alleged error of the trial court in excluding an order of the Illinois Commerce Commission directing the installation of automatic short-arm gates and flashing light signals at the crossing. This order was entered in the latter part of 1953 and required that the work be done within four months after the City of Chicago agreed to pay one-half the costs. In May 1954 the city consented to share the costs, and within four months thereafter, but after the accident involved herein, defendant complied with the order. In the discussion concerning the admissibility of the order plaintiffs' counsel stated: "****all I proposed and offered to prove, or inform the jury of, were the first two paragraphs on page 1, and the paragraph numbered 8 on page 3, which is as follows: 'That the grade crossing herein involved should be protected by means of automatic short armed gates with flashing light signals'; the balance being omitted." Only that part of the order contained in paragraph 8 and hereinabove quoted is in the record before us. There is nothing in the record to show the nature of the proceeding in which the order was entered or the findings of fact upon which it is based. The trial court did not err in excluding this evidence.

The trial court sustained an objection to a question asked of a traffic officer, "Is 111th street a preferential or through street at either a block west or a block east of the tracks for at least that distance?" Defendant

-4-

objected that the evidence was immaterial. Through streets are established for the purpose of regulating entrance into the streets by pedestrians or vehicles at street intersections. They do not affect the operation of railroad trains. Moreover, a witness for plaintiffs did testify that he believed west 111th street was a through street.

Elizabeth Lewis, who lived on west 111th street about 75 feet from defendant's tracks, testified that after the accident one of defendant's trainmen who came to the house to use a telephone told her the accident was defendant's fault because one of defendant's employees said, "We didn't blow the whistle." This testimony was stricken, and properly so. The statement of the employee was not part of the res gestae and therefore was not binding upon defendant. It might have been admissible to impeach the employee under certain circumstances and after the proper foundation was laid, but that question is not before us.

Plaintiffs' objections to the giving of instructions on behalf of defendant cannot be considered by the court. The instructions are inserted as a part of the common law record, they are not incorporated in the report of the proceedings at the trial and there is no certificate of the court as to the party offering these instructions. Plaintiffs' objections have not been preserved. Tir v. Shearn, 2 Ill. App.2d 257.

The judgment is affirmed.

. AFFIRMED.

BURKE, P. J., AND FRIEND, J., CONCUR.

214

A

46573

4 I.A.²⁴ 592

JAMES L. EMERICK,
Appellant,
v.

JOHN L. KEESHIN, CONSOLIDATED
WAREHOUSING CORPORATION, a cor-
poration, and TRUCK-RAIL TERMI-
NALS, INC., a corporation,
Appellees.

APPEAL FROM

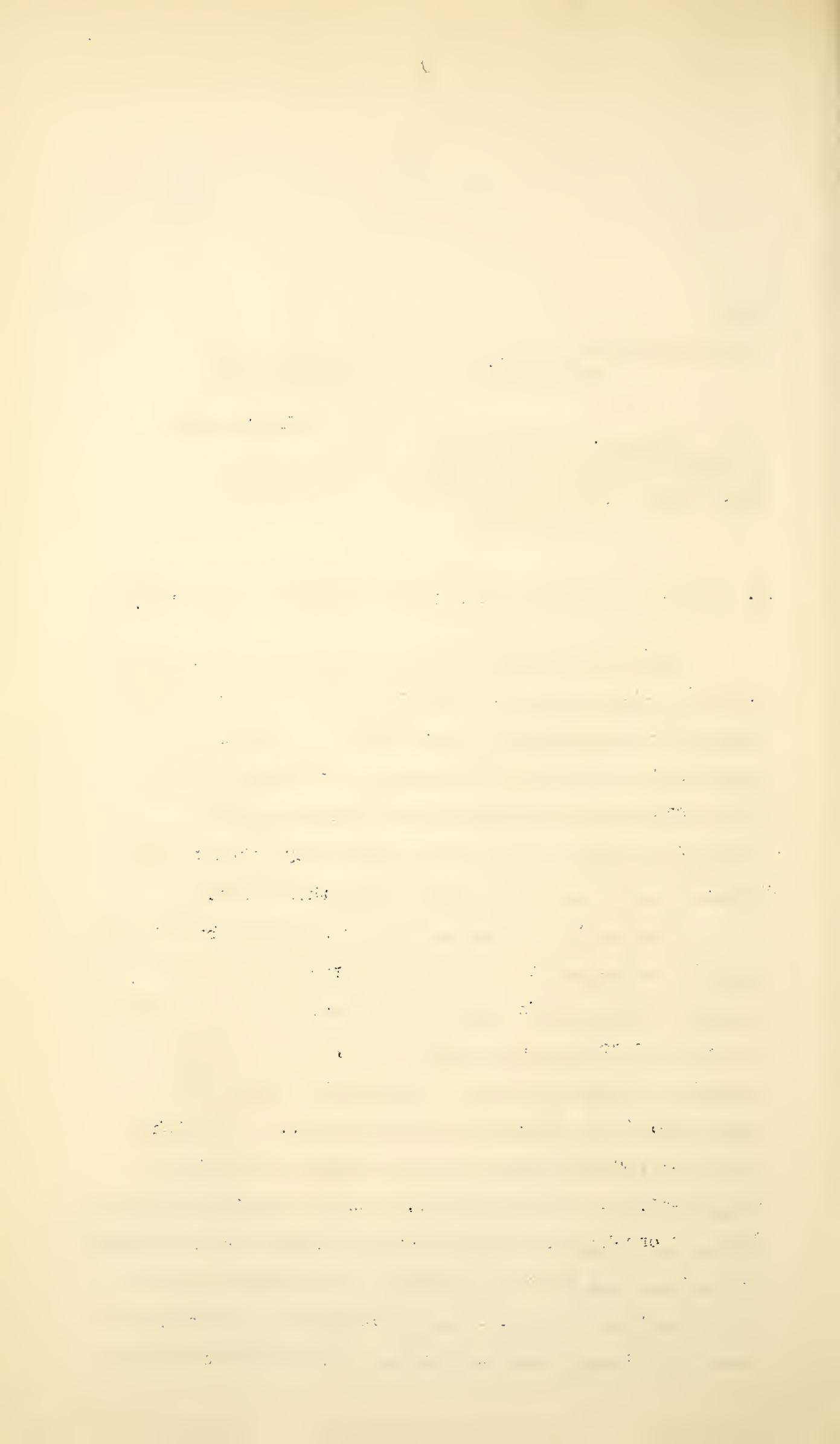
MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order entered November 13, 1953 dismissing his statement of claim and entering judgment for defendants, and an order of November 23, 1953 denying the motion to vacate the foregoing order and to grant leave to plaintiff to file an amended statement of claim. The appeal, erroneously taken to the Supreme court, has been transferred to this court.

Plaintiff's statement of claim charges a breach of contract of employment entered into between plaintiff and the Consolidated Warehousing Corporation for a period of five years commencing April 7, 1950, and a further agreement of the defendants Consolidated Warehousing Corporation, the Truck-Rail Terminals, Inc., with which the Consolidated Warehousing Corporation was merged or consolidated, and the individual, John L. Keeshin, to pay and defray one-half of the cost of a certain life insurance policy upon the life of plaintiff, and further to pay all of plaintiff's incidental business expenses, such as club charges and dues, entertaining and transportation expenses



and automobile expenses. October 23, 1953 defendants filed a motion to dismiss the statement of claim because of certain deficiencies in the statement specified in the motion, and because of the alleged release by plaintiff of all claims under the contract and the cancellation of same by mutual agreement of the parties. This motion was a combination of motions permissible under Rules 42 and 44 of the Civil Practice Rules of the Municipal Court of Chicago, which correspond to sections 45 and 48 of the Civil Practice Act. In support of the motion relating to the release and cancellation of the contract of employment, defendants filed the affidavits of Louis W. Levit, their attorney, and Helen O'Leary, secretary of the Truck-Rail Terminals, Inc., defendant. On the same day the court ordered that defendants' motion be entered and, on plaintiff's application for change of venue, sustained the application and transferred the cause to the Chief Justice, who ordered it set for trial before another judge November 9, 1953, at which time a hearing was had on defendants' motion to dismiss. This hearing was based solely upon the statement of claim, the motion to dismiss and supporting affidavits. No counteraffidavits were filed and no request made for leave to file affidavits or continue the hearing. An order was entered continuing the hearing on the motion to November 12, 1953 for decision. At that time plaintiff's counsel moved the court to file the counteraffidavits of himself and plaintiff, then presented to the court. An order was entered denying this motion and sustaining the motion of

defendants to dismiss the statement of claim and ordering that the statement "be, and it is hereby dismissed."

The following day a draft order signed by the trial judge was entered. This order recites that the cause came on for hearing upon the written motion of defendants to dismiss the statement of claim filed October 23, 1953, after due notice in writing to the attorney of record for plaintiff; that a full and complete hearing upon the motion was held and concluded before the undersigned trial judge on November 9, 1953, at which hearing the parties were represented by their respective counsel; that the motion to dismiss was supported by affidavits filed pursuant to Rule 44 of the Rules of Practice of the Municipal Court of Chicago in Civil Actions and set forth facts establishing that the claims sued upon in the statement of claim were released and discharged by plaintiff; that no counteraffidavits were offered by plaintiff upon the hearing and no application or motion was made by plaintiff prior to or upon the hearing of the motion, for a continuance or for an extension of time within which to file counteraffidavits or to offer other proof denying the facts alleged in the affidavits supporting defendants' motion to dismiss; that on November 12, 1953, when the cause was called by the clerk of the court for announcement by the court of its ruling and decision, plaintiff for the first time moved for leave to file counteraffidavits; that the court, having examined the motion to dismiss and the affidavits

in support thereof and having heard extensive arguments of counsel for the parties, finds and concludes that the employment contract between the Consolidated Warehousing Corporation, defendant, and the plaintiff, was duly canceled and discharged on or about June 1, 1952 by mutual agreement of the parties; that the statement of claim on its face is substantially insufficient in law and fails to state a cause of action against all or any of the defendants; that the motion of plaintiff for leave to file counteraffidavits, having been made for the first time three days after the conclusion of the hearing upon defendants' motion to dismiss, was not made in apt time under the rules of the court. It is ordered that the motion of plaintiff for leave to file counteraffidavits be denied, that the motion of defendants to dismiss the statement of claim be sustained and said statement of claim thereby dismissed with prejudice, and judgment entered for the defendants against plaintiff and that the costs be assessed against plaintiff. On November 19, 1953 plaintiff filed a motion to vacate the orders of dismissal of the statement of claim and denying leave to plaintiff to file counteraffidavits and to grant leave to file his amended statement of claim instanter, said amended statement being tendered with the motion.

Plaintiff's appeal is limited solely to the alleged errors of the court in denying leave to file the counteraffidavits tendered on November 12, 1953, in the order of

-5-

the court on November 13, 1953 and in denying plaintiff's motion to vacate the above mentioned orders and to grant to plaintiff leave to file an amended statement of claim. Plaintiff further argues that the court erred in refusing to grant plaintiff a trial by jury. Since the hearing on November 9, 1953 was based upon the statement of claim and the affidavits supporting the motion to dismiss, and no counteraffidavits were filed or offer of other proof made, no question of fact was before the court, and its determination of the motion and dismissal of the cause was based wholly upon questions of law. No report of proceedings before the court on November 9th has been filed and there is no showing that a demand for a jury on the motion to dismiss was made. However, the motion, if made, was without merit.

The record shows that plaintiff had notice of the filing of the motion to dismiss as early as October 23, 1953. No counteraffidavits were filed and no request for a continuance or for leave to file counteraffidavits at the hearing on November 9th or thereafter was made before or at that hearing; that the first application for leave to file the counteraffidavits was made when the case was called for the announcement of the decision by the trial court. Sub-par. 3 of Rule 44 of the Municipal Court of Chicago in Civil Actions provides:



"If, upon the hearing of such motion, the opposite party shall present affidavits or other proof denying the facts alleged or establishing facts obviating the objection, the court may hear and determine the same and may grant or deny the motion; ***."

The rule contemplates the filing of the counteraffidavits at or before the hearing, and the offering of other proof, if any, at the hearing. No excuse for plaintiff's failure to file the counteraffidavits in apt time is presented on this record. The trial court, therefore, did not err in denying the motion first presented on November 12th.

Furthermore, it appears from the record that the court dismissed the complaint and entered judgment for defendants upon substantial defects in the statement of claim and the failure to state a cause of action in the complaint. The ruling of the trial court in this respect is not questioned on appeal. Plaintiff therefore is in no position to raise the question of denial of leave to file the affidavits.

There being no error in dismissing the complaint and entering judgment, the trial court did not err in denying plaintiff's motion to vacate the order of dismissal and the judgment entered and to grant leave to file an amended statement of claim.

The orders appealed from are affirmed.

ORDERS AFFIRMED.

BURKE, P. J. AND FRIEND, J., CONCUR.

*This Book
Does Not
CIRCULATE*

RESERVE BOOK

ALL UNPUBLISHED OPINIONS

VOL. 4 2nd series

74280

This reserve book is NOT transferable and must NOT be taken from the library except when charged out for overnight use.

You are responsible for the return of this book.

[illegible]

